141-5-60

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~863~~. 52

THE PATENT CLOTHING COMPANY, LIMITED, APPELLANT,

vs.

H. B. GLOVER, JOHN B. GLOVER, L. C. BISSELL, AND A. J. PARKER, COMPOSING THE FIRM OF H. B. GLOVER & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 14, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 363.

THE PATENT CLOTHING COMPANY, LIMITED, APPELLANT,

vs.

H. B. GLOVER, JOHN B. GLOVER, L. C. BISSELL, AND A. J. PARKER, COMPOSING THE FIRM OF H. B. GLOVER & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Subpœna	1	1
Marshal's return	2	1
Bill of complaint	3	1
Appearance for defendants	11	6
Stipulation as to use of proofs in four cases	12	6
Answer	13	7
Stipulation amending bill of complaint	21	11
Replication	22	12
Consent to amendment of bill	22¾	12
Evidence for complainant in chief	23	13
Notice to take testimony	24	13
Testimony of Alonzo J. Parker	25	14
John B. Glover	28	16
Lester C. Bissell	31	18
Edward S. Renwick	36	20
Evidence for complainant in rebuttal	42	24
Testimony of Edward S. Renwick	43	24
John D. Vermeule	50	28

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 17, 1891.

1 *Alias.*

[L. S.] The President of the United States of America to H. B. Glover, John B. Glover, L. C. Bissell, and A. J. Parker, composing the firm of H. B. Glover & Co., as we have before commanded you, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of August, A. D. 1884, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Patent Clothing Company, and do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, on the 27th day of June, in the year one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and eighth.

TIMOTHY GRIFFITH, *Clerk.*

WETMORE & JENNER,
Complainant's Sol'rs.

The defendants are required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of August, 1884, or the bill will be taken *pro confesso* against them.

T. G., *Clerk.*

2 (Endorsed:) I hereby certify that on the 3rd day of July, 1884, at the city of New York, I personally served the within subpœna upon the within-named H. B. Glover by exhibiting to him the within original, and at the same time leaving with him a copy thereof. Dated July 15, 1884. (Signed) Joel B. Erhardt, U. S. marshal, S. D. N. Y.

(Endorsed:) U. S. circuit court. Filed July 15, 1884. Timothy Griffith, clerk.

3 Circuit Court of the United States for the Southern District of New York.

PATENT CLOTHING COMPANY (Limited), Complainant,
vs.
H. B. GLOVER, JOHN B. GLOVER, L. C. BISSELL, and A. J. PARKER, Composing the Firm of H. B. Glover & Co., Defendants. } In Equity.

To the honorable the judges of said court:

The Patent Clothing Company (Limited), a corporation organized under the laws of the State of New York, brings this its bill of com-

plaint against H. B. Glover, John B. Glover, L. C. Bissell, and A. J. Parker, and thereupon complains and says—

That it is a corporation organized under the laws of the State of New York.

That the defendants, H. B. Glover, John B. Glover, L. C. Bissell, and A. J. Parker, are copartners, doing business as such at the city of Dubuque, in the State of Iowa, under the firm name of H. B. Glover & Co.

That heretofore and before the 25th day of May, *——6, Rod-
4 mond Gibbons, of San Francisco, Cal., as it now verily believes, became and was the original and first inventor of an improvement in pantaloons, and thereupon applied unto the Commissioner of Patents of the United States for letters patent therefor in manner and form as by statute required; that thereafter due proceedings were had on said application, and letters patent of the United States, duly signed and sealed, were issued thereon and delivered unto the said Rodmond Gibbons for the said invention, dated the 6th day of June, 1876, numbered 178,287, thereby granting to the said Rodmond Gibbons, his heirs, executors, administrators, and assigns, for the term of seventeen years thereafter, the full and exclusive right and liberty of constructing, using, and vending to others to be used the said invention as described in the schedule annexed to and forming part of said letters patent, which said letters patent or a certified copy thereof complainant will produce as your honors shall direct.

That thereafter and before the 22d day of March, 1881, the said Rodmond Gibbons, for good and lawful cause and in compliance with the statute in such case enacted, surrendered the said letters patent unto the Commissioner of Patents and petitioned for a reissue thereof on an amended specification and claims, and that thereafter due proceedings were had on said application; and thereafter a new patent for the same invention and in accordance with a corrected specification was, on the 22d day of March, 1881, duly signed, sealed, issued, and delivered unto the said Rodmond Gibbons, dated, as aforesaid, the 22d day of March, 1881, as in and by said reissued letters patent numbered 9616, in court to be produced, or a certified copy thereof will more fully appear.

That afterward, to wit, on or about the 2d day of April,
5 1883, the said Rodmond Gibbons, by a duly drawn, executed, delivered, and recorded instrument in writing, sold, assigned, and transferred unto the complainant the said reissue letters patent No. 9616, and all his right, title, and interest in and to said reissue letters patent and the invention thereby secured—as by said assignment or a duly certified copy thereof, in court to be produced, if required, will more fully and at large appear—and also all his right, title, and interest in and to any and all claims and demands against any and every person whomsoever for damages, profits, or otherwise arising out of the infringement theretofore of said reissue letters patent No. 9616, as by said assignment or a duly certified copy

*Illegible.

thereof, in court to be produced, if required, will more fully and at large appear.

That the said Rodmond Gibbons and assigns have, since the allowance of said reissue letters patent No. 9616, been exclusively possessed of the same and of the invention thereby secured, and, by himself and his assigns and licensees, has put the same in practice, and has made and sold large numbers of overalls embodying and constructed according to the invention described and claimed in said reissue letters patent No. 9616, and his and their exclusive rights thereby secured have been generally respected and acquiesced in by the public.

That there-fore and before the 28th day of October, 1876, David Neustadter, of said city of San Francisco, became and was the original and first inventor of an improvement in overalls, and thereupon applied unto the Commissioner of Patents of the United States for letters patent therefor in manner and form as by statute required; that thereafter due proceedings were had on said application, and letters patent of the United States, duly signed and sealed, were issued thereon and delivered unto the said David Neustadter
6 for the said invention, dated the 30th day of October, 1877, numbered 196,693, thereby granting to the said David Neustadter, his heirs, executors, administrators, and assigns, for the term of seventeen years thereafter, the full and exclusive right and liberty of constructing, using, and vending to others to be used the said invention, as described in the schedule annexed to and forming part of said letters patent, which said letters patent or a certified copy thereof complainant will produce, as your honors shall direct.

That thereafter and before the 6th day of September, 1881, the said David Neustadter, for good and lawful cause and in compliance with statutes in such case enacted, surrendered the said last-mentioned letters patent unto the Commissioner of Patents, and petitioned for a reissue thereof on an amended specification and claims, and that thereafter due proceedings were had on said application; and thereafter a new patent for the same invention and in accordance with a corrected specification was, on the 6th day of September, 1881, duly signed, sealed, issued, and delivered unto the said David Neustadter, dated as aforesaid, the 6th day of September, 1881, as in and by said reissued letters patent numbered 9863, in court to be produced, or a certified copy thereof, will more fully appear.

That afterward, to wit, on or about the 2d day of April, 1883, the said David Neustadter, by a duly drawn, executed, delivered, and recorded instrument in writing, sold, assigned, and transferred unto the complainant the said reissue letters patent No. 9863 and all his right, title, and interest in and to said reissue letters patent and the invention thereby secured—as by said assignment or a duly certified copy thereof, in court to be produced, if required, will more fully
7 and at large appear—and also all his right, title, and interest in and to any and all claims and demands against any and every person whomsoever for damages, profits, or otherwise arising out of the infringement theretofore of said reissue letters patent No.

9863, as by said assignment or a duly certified copy thereof, in court to be produced, if required, will more fully and at large appear.

That the said David Neudstadter and his assigns have, since the allowance of said reissue letters patent No. 9863, been exclusively possessed of the same and of the invention thereby secured, and by himself and his assigns and licensees has put the same in practice and has made and sold large numbers of overalls constructed according to the invention described and claimed in said letters patent No. 9863, and their exclusive rights, thereby secured, have been generally respected and acquiesced in by the public.

That your orator is able and desirous to supply all reasonable demand of the public for overalls embodying and constructed according to the inventions respectively described and claimed in said reissue letters patent No. 9616 and No. 9863 or either of them, and has granted a large number of licenses to others to make, use, and sell overalls containing said inventions.

That your orator is informed and believes and therefore charges that said defendants and each of them, since the first day of January, 1882, at the city of Dubuque, State of Iowa, and at divers other places throughout the United States, has made, used, and sold great numbers of overalls made, arranged, constructed, and combined according to the principles, construction, arrangement, and combination set forth, described, and claimed in said several reissue letters patent without license or permission of your orator or of the assignor to your orator or of either of them, and contrary to and
8 in infringement of your orator's and said assignor's respective rights, and the defendants and each of them threatens to continue such infringement, and your orator fears that they and each of them will continue said infringement to the great and irreparable damage of your orator in the sum, as your orator believes, of fifty thousand dollars; that such infringement by the defendants and each of them also interferes with and diminishes the sales of overalls containing such patented improvement, which but for such infringement would be made by the licensees of your orator, and thereby the profits of your orator arising from license fees and royalties is largely and materially diminished, and also encourages other persons to infringe said letters patent.

That the said several inventions are capable of being conjointly used, and they have been since said January 1, 1882, used by the defendants and each of them, and they have also, since said last-mentioned date, been separately used by them and each of them.

That your orator has requested the defendants not to infringe its said exclusive rights secured as aforesaid, but they have refused to desist.

Wherefore, that the said defendants may answer the premises; may be enjoined from the practice of said infringement pending this suit; may be perpetually enjoined from said infringement; may account to your orator for the gains and profits made by them and each of them from the manufacture, use, or sale of improvements in pantaloons or overalls in infringement of said several reissue letters patent and your orator's rights thereunder, and that the dam-

ages sustained by your orator in the premises may be assessed, as by statute provided, to the amount of $50,000, and for other relief—

May it please your honors to grant to your orator:

9 1. A writ of injunction conformable to the prayer of this bill until further order of the court.

2. A writ of perpetual injunction, according to the prayer of this bill.

Each in due and usual form and under the usual penalties, and each directed to the said defendants and each of them and their and his agents, officers, attorneys, clerks, servants, and employees.

3. A writ of subpœna—

In due and usual form and under usual penalties, directed to the said defendants and each of them.

And such other and further relief as your honors may deem meet.

And your orator will ever pray, etc.

PATENT CLOTHING COMPANY (LIMITED),
By RODMOND GIBBONS, *Secretary.*

WETMORE & JENNER,
Solicitor for and Counsel with Complainant,
No. 206 Broadway, New York City.
WM. A. JENNER, *Of Counsel.*

UNITED STATES OF AMERICA,
State of New York, County of New York, Southern District of New York, } ss:

Rodmond Gibbons, of said city, being duly sworn, says: I am the secretary of the Patent Clothing Company (Limited), the complainant in this bill. I have read the foregoing bill of complaint and know the contents thereof, and that the same are true except

10 the matters stated on information and belief, and those I believe to be true.

RODMOND GIBBONS.

Subscribed and sworn to before me this 25th day of January, 1884.

JOHN H. IVES,
[L. S.] *Notary Public, Kings and New York Counties.*

(Bill endorsed:) United States circuit court, southern district of New York. Patent Clothing Company (Limited) *vs.* H. B. Glover & Co. Bill of complaint. Wetmore & Jenner, compl't's sol'rs, 206 B'dway, N. Y.

(File-mark:) U. S. circuit court. Filed Jan. 18, 1884. Timothy Griffith, clerk.

11 United States Circuit Court, Southern District of New York.

PATENT CLOTHING COMPANY
against
H. B. GLOVER, JOHN B. GLOVER, L. C. BISSELL, and A. J. PARKER. } In Equity.

The clerk of this court will please enter my appearance as solicitor for the defendants in the above-entitled cause.

Yours, &c.,

(S'g'd) G. M. PLYMPTON,
Solicitor for Defendants.

Dated New York, July 28, 1884.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. Patent Clothing Company against H. B. Glover *et al.* Appearance. G. M. Plympton, sol'r for def'ts, 245 Broadway, New York city.
(Endorsed:) U. S. circuit court. Filed July 28, 1884. Timothy Griffith, clerk.

12 U. S. Circuit Court, Southern District of New York.

THE PATENT CLOTHING COMPANY (Limited)
vs.
H. B. GLOVER *et al.*

SAME
vs.
ISAAC ROSENSTEIN *et al.*

SAME
vs.
J. STERNGLANZ *et al.*

SAME
vs.
ISAAC FRANK *et al.* } In Equity.

The four above-entitled suits in equity having been brought for the alleged infringement of letters patent (reissued) No. 9616, granted to Rodmond Gibbons on the 22nd day of March, 1881, and assigned to the above-named complainant:

13 It is hereby stipulated and agreed by the solicitors for the complainant and defendants respectively that the proofs introduced on the part of the complainant or the defendants in any one of said suits shall be considered and taken as introduced in each and all of said four suits so far as the same shall be pertinent to the issues involved in any or all of said suits, and said proofs may be read and be otherwise used at the final hearing of any one or all of

said suits with the same force and effect as if they had been originally and separately taken for each of said suits.

Dated New York, July 13, 1886.

WETMORE & JENNER,
Solicitors for Complainant.
GILBERT M. PLYMPTON,
Solicitor for Defendants.

Circuit Court of the United States for the Southern District of New York.

PATENT CLOTHING COMPANY (Limited)
against
ISAAC FRANK, ABRAM KAHN, and EDWARD FRANK. } In Equity.

The joint and several answer of Isaac Frank, Abram Kahn, and Edward Frank, defendants, to the bill of complaint of the said complainant.

These defendants, reserving to themselves and each of them all benefit of exception to the errors and insufficiencies of the said bill of complaint, for answer thereunto or unto so much and such
14 parts thereof as these defendants are advised is or are material or necessary for them or any of them to make answer unto, severally answering, say—

That neither they nor any of them have any knowledge or information whether the complainant is "a corporation organized under the laws of the State of New York," as is alleged in the said bill of complaint, except such knowledge and information as the defendants have obtained from the complainant's said bill of complaint, and therefore they leave the complainant to make such proof thereof as it may be advised is necessary. But these defendants severally admit that they are copartners, doing business as such in the city of New York, in the State of New York, under the firm name of I. Frank & Co., as is alleged in the said bill of complaint.

And these defendants, further severally answering, say that neither they nor any of them have any knowledge or information regarding the alleged invention of Rodmond Gibbons mentioned in said bill for an improvement in pantaloons, nor said Gibbons' application for letters patent therefor, nor the issue of letters patent therefor to said Gibbons bearing date the 6th day of June, 1876, and numbered 178,287, nor the reissue of such letters patent on the 22d day of March, 1881, numbered 9616, nor the assignment by said Gibbons to the orator of said alleged letters patent No. 9616 and the invention claimed to be thereby secured and all claims and demands arising out of the infringement of said alleged reissue letters patent prior to such assignment, all of which matters aforesaid are alleged in the said bill of complaint, except only the defendants have such knowledge and information as they have obtained from the complainant's said bill of complaint, and therefore they leave the complainant to make such proof of these several matters alleged by it as it may be advised is necessary.

15 But these defendants severally deny that the said letters patent dated June 6, 1876, issued to Rodmond Gibbons and numbered 178,287, were surrendered for good and lawful cause or were inoperative by reason of a defective or insuffi-ent specification arising from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention on the part of the said Gibbons, or that the specification of said letters patent dated June 6th, 1876, granted to said Gibbons was duly and properly amended, and the defendants on information and belief aver that said surrender, as well as the procurement of said reissue dated March 22d, 1881, by said Gibbons, was fraudulent and for the purpose only of covering inventions and things not made or discovered by the said Gibbons.

And these defendants, further answering, on information and belief severally say that said reissued letters patent number 9616, granted to the said Rodmond Gibbons on the 22d day of March, 1881, are broader than the alleged invention of the said Gibbons and cover more than was described or made known in the said original patent to which they pertain or in the application therefor, and more than was represented in the model deposited in the Patent Office on the application for said original patent, and that the said reissue is not for the same invention as the said original patent.

And these defendants further say, on information and belief, that said reissued patent dated March 22d, 1881, is obscure and ambiguous, and that the description therein does not sufficiently describe the things covered by the claims thereof so as to enable one skilled in the art to which it relates to construct the articles purporting to be described in and secured by said reissue, and that the alleged improvements described in the specification of said reissue dated March 22d, 1881, did not involve or require invention at the time of their pretended invention by the said Gibbons, but the same were

16 obvious, and that the said Gibbons did not invent them or any of them, and that there were unreasonable laches and delay on the part of the said Gibbons in making application for the said reissued letters patent, and that said reissued letters patent dated March 22d, 1881, and numbered 9616, are therefore void.

And these defendants, further severally answering, deny that said Rodmond Gibbons and his assigns, since the allowance of said reissued letters patent No. 9616, have been exclusively possessed of the same and of the invention thereby secured, or that said alleged exclusive rights or the exclusive right of any or all of them thereby secured have been generally respected and acquiesced in by the public, as alleged by the complainant's said bill of complaint, and they further say that neither they nor any of them have any knowledge or information that the said parties have, by themselves and their assignor and licensees, put the same in practice and made and sold large numbers of overalls constructed according to the invention described and claimed in said reissued letters patent No. 9616, as is stated in the complainant's said bill, and therefore they leave the complainant to make such proof thereof as it may be advised is necessary.

And these defendants, further severally answering, say, on information and belief, that the said alleged invention patented in and by said original patent and the reissue thereof and substantial and material parts of the same claimed as new had been openly and publicly made, used, and sold by the said Gibbons and by others with his knowledge and consent and allowance for more than two years prior to the application for the original patent therefor, and that the said Gibbons had forfeited, by delay in applying for his letters patent, any right to a patent for the alleged improvement specified as his invention in said original patent and reissue which he may ever have possibly had, and that the said Gibbons, before making application for his said original patent, had abandoned
17 his said alleged invention to the public and allowed the same to go into public use with his full know-edge and consent, and that the public had accepted and used the same in pursuance of such abandonment.

And these defendants, further severally answering, say that the garments manufactured by them, which are alleged by the complainant to be an infringement upon its rights and the rights of its assignor and licensees under said reissue patent No. 9616, are now and always have been manufactured by these defendants as licensees under and in accordance with the description contained in letters patent number 224,175, which were granted to one John B. Glover on the 3d day of February, 1880, as will more fully and at large appear from a certified copy of said patent, now ready in court to be produced.

And these defendants, further severally answering, say, on information and belief, that substantial and material parts of the said alleged invention claimed as new in said reissued letters patent No. 9616 and alleged to be infringed by these defendants were well known and in public use long prior to the alleged invention thereof by said Gibbons and for more than two years prior to the application for a patent therefor, and that the said Gibbons was not the first and original inventor thereof, and that such prior knowledge and use was had by the following-named persons at the places mentioned, viz: Benjamin Lindaur, Lewis Wurtzburger, Isaac Mandelbaum, Joseph Wohle, J. M. Brockaw, S. Laskey, all of whom had such knowledge at the city of Chicago, State of Illinois, and all of whom now reside or lately resided in said city; David Lubin, who had such knowledge at the city of San Francisco, State of California, and who now resides or lately resided in said city; William C. Browning, who had such knowledge at the city of New York, State of New York, and at the city of Chicago, State of Illinois, who now resides or lately resided at said city of New York; J. A. Minot, J. D. Ver-
18 meule, J. D. Ferguson, B. M. Hotchkins, —— Burt, D. C. Hall, Henry C. Stevens, James C. Cooley, V. Henry Rothschild, and Wallis Howland, all of whom had such knowledge at the city of New York, State of New York, and all of whom reside or lately resided at said city; J. W. Hines, at Cohoes, State of New York, and at the city of New York, who now resides or lately resided at said Cohoes;

Thomas S. Hall, at New Britain, State of Connecticut, and at the city of New York, who now resides or lately resided at said New Britain; Elmer G. Doolittle, Anthony D. Schroeder, S. A. Swenerton, each of whom had such knowledge at the city of New York, State of New York, and all of whom reside or lately resided at Montclair, State of New Jersey; A. R. Trotter, who had such knowledge at Bristol, State of Rhode Island, and at the city of New York, State of New York, who now resides or lately resided at said Bristol; Henry Kitzinger, who had such knowledge at said city of New York and who now resides or lately resided in said city.

And these defendants further say, on information and belief, that the names of other persons, whose names and residences cannot at this time be accurately ascertained, but who are believed to have had knowledge of the alleged invention described and claimed in said letters patent for more than two years prior to the application for said patent, will hereafter be ascertained, and these defendants crave leave to insert said other names in this answer.

And these defendants, further severally answering, say, on information and belief, that the substantial and material parts of said alleged invention claimed by said reissued patent No. 9616 and alleged to be infringed by these defendants as aforesaid were, prior to the patented invention thereof by the said Gibbons, also shown and described, patented and published, in the letters patent of the United States as follows, to wit:

Letters patent No. 108,948, granted November 1st, 1870, to J. H. Walker for an improvement in boots.

19 Letters patent No. 117,885, granted August 8th, 1871, to Irving A. Howe for improvement in drawers.

Letters patent No. 143,198, granted September 23, 1873, to W. S. Taylor for improvement in shirts.

Letters patent No. 129,776, granted July 23, 1872, to B. C. Young for an improvement in riding boots.

Letters patent No. 139,891, granted February 10, 1875, to N. H. Bruce for an improvement in knitted garments.

Letters patent No. 68432, granted September 3, 1867, to E. W. French for an engine hose.

Letters patent No. 113,128, granted March 28, 1871, to John H. Andrus for a skin undergarment.

And these defendants further say, on information and belief, that the substantial and material parts of the said alleged invention claimed by said reissued patent No. 9616 and alleged to be infringed by these defendants as aforesaid were, prior to the pretended invention thereof by the said Gibbons, also shown and described in the application of David Lubin for a patent for an overall filed July 3, 1875, which patent then applied for was issued to the said Lubin on the 12th day of August, 1884, and numbered 303,578.

And these defendants, further answering, say, on information and belief, that for more than two years before the said Gibbons made application for said original letters patent number 178,287 the alleged invention described and claimed in said patent and in the reissue thereof, No. 9616, was known to the commissary general of the

United States armory, at the city of Washington, District of Columbia, and elsewhere, and that the same has been and now is on public exhibition in the office of said commissary general, in the War Department of the United States, at said city of Washington.

20 And these defendants, further severally answering, deny that they or any of them have, in the city of New York or elsewhere, in any manner infringed or are now infringing any lawful rights of the complainant or of its assignor by the manufacture or sale of overalls, or that the complainant is entitled to any relief in the premises.

All of which matters and items the defendants are ready to aver, sustain, and maintain as this honorable court shall direct, and they hereby pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

ISAAC FRANK.
A. KAHN.
EDWARD FRANK.

G. M. PLYMPTON,
Solicitor and of Counsel for Defendants.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

We, Isaac Frank, Abram Khan, and Edward Frank, being severally duly sworn, depose and say we are the defendants in the above-entitled suit in equity. We have each read the foregoing answer subscribed by us and know the contents thereof, and the same is true of our own knowledge and the knowledge of each of us, except as to the matters therein stated to be alleged on information and belief, and as to those matters we and each of us believe it to be true.

ISAAC FRANK.
A. KAHN.
EDWARD FRANK.

Sworn and subscribed before me this 2d day of April, 1886.

[L. S.]

WILLIAM V. A. POE,
Notary Public, New York County.

21 United States Circuit Court, Southern District of New York.

PATENT CLOTHING COMPANY (Limited) *vs.* H. B. GLOVER *et al.* } In Equity. No. 2962.

The bill of complaint in the above-entitled suit having alleged infringement by the defendants of reissued letters patent 9316, granted to Rodmond Gibbons on the 22d day of March, 1881, and also in like manner alleged the infringement of reissued letters patent No. 9863, granted to David Neustader on the 6th of September, 1881, and the complainant now desiring to amend said bill of complaint by charging the defendants with the infringement of said

Gibbons reissue only and desiring that all reference to said Neustadter reissued patent be erased from said bill of complaint, so that the above suit No. 2962 shall allege only the infringement of said reissue No. 9616—

It is consented that the bill of complaint may be amended as hereinbefore recited without prejudice to the defendants in any way, and that all the proofs heretofore taken shall be used with the same force and effect after said amendment and at the final hearing of the cause as they would have been used had this amendment not been made, it being understood that no other amendment or alteration shall be made in said bill of complaint save that hereinbefore stated, without leave of the court.

New York, May 18, 1886.

WETMORE & JENNER,
Complainant's Solicitors.
G. M. PLYMPTON,
Defendant's Solicitor.

22 Circuit Court of the United States for the Southern District of New York.

PATENT CLOTHING COMPANY (Limited), Complainant,
vs.
H. B. GLOVER *et al.*, Defendants. } In Equity.

The replication of Patent Clothing Company (Limited), complainant, to the answer of H. B. Glover, John B. Glover, L. C. Bissell, and A. J. Parker, comprising the firm of H. B. Glover & Co., defendants.

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, says that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without
22½ this, that any other matter or thing whatsoever in the answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

WETMORE & JENNER,
Complainant's Solicitors, 206 *Broadway, New York.*

New York, November 3, 1885.

(Endorsed:) Circuit court of the U. S., southern district of New York. Patent Clothing Company (Limited), *vs.* H. B. Glover & *al.* Replication. Wetmore & Jenner, compl't's sol'rs, 206 B'dway, New York.

(File-mark:) U. S. circuit court. Filed Nov. 3, 1885. Timothy Griffith, clerk.

22¾ United States Circuit Court, Southern District of New York.

PATENT CLOTHING COMPANY (Limited) *vs.* H. B. GLOVER *et al.* } In Equity. No. 2962.

The bill of complaint in the above-entitled suit having alleged infringement by the defendants of reissued letters patent 9616, granted to Rodmond Gibbons on the 22d day of March, 1881, and also in like manner alleged the infringement of reissued letters patent No. 9863, granted to David Neustadter on the 6th of September, 1881, and the complainant now desiring to amend said bill of complaint by charging the defendants with the infringement of
23 said Gibbons' reissue only, and desiring that all reference to said Neustadter reissued patent be erased from said bill of complaint, so that the above suit No. 2962 shall allege only the infringement of said reissue No. 9616—

It is consented that the bill of complaint may be amended as hereinbefore recited without prejudice to the defendants in any way, and that all the proofs heretofore taken shall be used with the same force and effect after the said amendment and at the final hearing of the cause as they would have been used had this amendment not been made, it being understood that no other amendment or alteration shall be made in said bill of complaint save that hereinbefore stated without leave of the court.

G. M. PLYMPTON,
Defendants' Solicitor.

New York, May 18, 1886.

(A.)

STATE OF IOWA, *Dubuque County,* } *ss:*

United States Circuit Court, Southern District of New York.

PATENT CLOTHING COMPANY (Limited) *vs.* H. B. GLOVER. } In Equity.

Testimony taken for the complainant for final hearing, under
24 and pursuant to the 67th rule of the Supreme Court of the United States, as amended, and the annexed notice, before me, C. E. Lyon, a notary public of Iowa in and for Dubuque county, at the city and county of Dubuque, State of Iowa, this 13th day of February, A. D. 1886.

Present: William E. Furniss, Esq., for the complainant; Messrs. Frank & Lyon, for defendants.

United States Circuit Court, Southern District of New York.

PATENT CLOTHING COMPANY (Limited), Complainant, *vs.* H. B. GLOVER *et al.*, Defendants. }

Please take notice that the complainant desires the testimony in

this cause to be taken orally, and that the witnesses on behalf of said complainant will be examined before C. E. Lyon, at his office, south-east corner Main street and Fifth street, in the city of Dubuque, Iowa, on Saturday, the 13th day of February, 1886, at 9 o'clock in the forenoon of that day, and if not then completed will proceed thereafter before the said examiner at the times and places to which the said examinations may be duly adjourned.

Yours, &c., WETMORE & JENNER,
Complainant's Solicitors, 206 Broadway, New York.

G. M. Plympton, Esq., defendants' solicitor.

New York, February 3, 1886.

ALONZO J. PARKER, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the above-entitled action, deposes as follows:

Int. 1. What is your name?
Ans. Alonzo J. Parker.
Int. 2. What is your age, residence, and occupation?
Ans. My age is thirty-eight; live in Dubuque, Iowa, and I am a member of the firm of H. B. Glover & Co.
Int. 3. Do you know the complainant in this case?
Ans. Yes, sir.
Int. 4. Are you one of the defendants in this case?
Ans. I am.
Int. 5. Do you know the other defendants in this suit?
Ans. I do.
Int. 6. State whether or not the defendants are partners composing the firm of H. B. Glover & Co.
Ans. They are.
Int. 7. How long have you been connected with the firm of H. B. Glover & Co.?
Ans. Since January 18, 1876.
Int. 8. Since the 22d March, 1881, what, if any, has been your special business in the firm?

Objected to as incompetent, irrelevant, and immaterial.

Ans. As buyer and selling member.
Int. 9. Have you had any especial connection with the manufacturing department?

Same objection.

Ans. Not any more so than any other member of the firm.
Int. 10. State whether or not the defendants are engaged in the manufacture and sale of overalls.

Same objection.

Ans. They are, with other goods.

Int. 11. Are such overalls manufactured under letters patent of the United States; and, if so, under what patent?

Same objection.

Ans. They are; under patent No. 224,175, patented February 3, 1880; application filed July 28, 1879.

Int. 12. When did the defendants first manufacture and sell said overalls?

Same objection.

Ans. Since the application for the patent, about the middle of July, 1879.

Int. 13. State whether or not defendants have continued to manufacture and sell said overalls continuously since the date you have last named.

Same objection.

27 Ans. They have.

Int. 14. Look at this pair of overalls and state if it is one of those manufactured by defendants.

Same objection.

Ans. Yes, sir.

Complainant's attorney tenders this pair of overalls and asks that it be attached to the deposition as an exhibit or that it may be identified and transmitted with the depositions as such exhibit.

Int. 15. If you say yea to the last interrogatory, state whether this exhibit was manufactured by said defendant under said letters patent and whether or not they have sold overalls like it.

Same objection.

Ans. They have.

Int. 16. When did they begin to manufacture and sell overalls like the exhibit?

Same objection.

Ans. I could not say; but defendant has made similar ones under said patent since 1879, in July.

Int. 17. Note the peculiarity of the fly opening and the extension of the button-hole strip under the button strip in the exhibit and state whether or not the defendants have manufactured and sold overalls so made since the 22d of March, 1881, and prior to the 13th of April, 1885.

Same objection.

Ans. Defendants have made them continuouly since July, 1879. Defendants have not changed them at all.

28 Int. 18. I understand you to say this with reference to the peculiarity you are requested to note in the exhibit as well as to the other parts.

Same objection.

Ans. Yes, sir.

Int. 19. State, if you can, the date when the exhibit was manufactured, as near as you can.

Same objection.

Ans. That I cannot state.

ALONZO J. PARKER.

STATE OF IOWA, *Dubuque County,* } ss:

Subscribed and sworn to before me by the affiant, Alonzo J. Parker, this 13th day of February, 1886.

C. E. LYON,
Notary Public of Iowa in and for Dubuque Co.

JOHN B. GLOVER, being first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the above-entitled action, deposes as follows:

Int. 1. What is your name, age, residence, and occupation?

Ans. My name is John B. Glover; my age is fifty-two; live in Dubuque, Iowa, and am engaged in the wholesale notion trade, furnishing goods, and manufacture.

Int. 2. Do you know the complainant in this case?

Ans. I have heard of him.

Int. 3. Are you one of the defendants in this case?

Ans. Yes, sir.

Int. 4. Do you know the other defendants in this suit?

29 Ans. I do.

Int. 5. How long have you known them?

Ans. A good many years.

Int. 6. State whether or not the defendants are partners composing the firm of H. B. Glover & Co.

Ans. They are.

Int. 7. How long have you been connected with the firm of H. B. Glover & Co. as now constituted?

Ans. Since January 1, 1876.

Int. 8. Since the 22d March, 1881, what has been your especial business in the firm?

Objected to as incompetent, irrelevant, and immaterial.

Ans. I have been generally interested in the business of the firm in all its branches.

Int. 9. Have you had any especial connection with the manufacturing department?

Same objection.

Ans. Not any more so than any other member.

Int. 10. State whether or not the defendants are engaged in the manufacture and sale of overalls.

Same objection.

Ans. They are in connection with other goods.

Int. 11. Are such overalls manufactured under letters patent of the United States; and, if so, under what patent?

Same objection.

Ans. They are; under patent 224,175.

30 Int. 12. When did the defendants first manufacture and sell said overalls?

Same objection.

Ans. Since in July, 1879.

Int. 13. State whether or not defendants have continued to manufacture and sell said overalls continuously since the date you have last named.

Same objection.

Ans. Yes, sir.

Int. 14. Look at the pair of overalls offered as an exhibit in the deposition of Alonzo J. Parker and identified by his initials on the tag and state if it is one of those manufactured by defendants.

Same objection.

Ans. I think it is.

Int. 15. State whether said exhibit was manufactured by defendants under said letters patent and whether or not they have sold overalls like it.

Same objection.

A. Yes, and they have.

Int. 16. When did they begin to manufacture and sell overalls like the exhibit?

Same objection.

Ans. We made similar goods since July, 1879.

31 Int. 17. Note the peculiarity of the fly opening and the extension of the button-hole strip under the button strip in the exhibit and state whether or not the defendants have manufactured and sold overalls so made since the 22d March, 1881, and prior to the 13th April, 1885.

Same objection.

Ans. We have always made them the same way under the patent since we commenced, in July, 1879.

Int. 18. This applies to the peculiarity in the fly you were requested to note as well as to the other part of the make?

Same objection.

Ans. To the fly alone.

Int. 19. State, as near as you can, the date when the exhibit was manufactured.

Same objection.

Ans. It is impossible to state the time.

JOHN B. GLOVER.

STATE OF IOWA, *Dubuque County,* } ss:

Subscribed and sworn to before me by the affiant, John B. Glover, this 13th day of February, 1886.

C. E. LYON,
Notary Public of Iowa in and for Dubuque Co.

LESTER C. BISSELL, being duly sworn to testify to the truth, the whole truth, and nothing but the truth in the above-entitled action, deposes as follows:

Int. 1. What is your name, age, residence, and occupation?

32 Ans. My name is Lester C. Bissell; age, thirty-two years; live in Dubuque; am a member of the firm of H. B. Glover & Co. I am financial and credit man.

Int. 2. Do you know the complainant in this case?

Ans. I know of it.

Int. 3. Are you one of the defendants in this case?

Ans. I am.

Int. 4. Do you know the other defendants in this suit, and how long have you known them?

Ans. I do; for a good many years.

Int. 5. State whether or not the defendants are partners composing the firm of H. B. Glover & Co.

Ans. They are.

Int. 6. How long have you been connected with the firm of H. B. Glover & Co. as now constituted?

Ans. Since January 1, 1876.

Int. 7. State whether or not the defendants are engaged in the manufacture and sale of overalls.

Objected to as incompetent, irrelevant, and immaterial.

Ans. They are.

Int. 8. Are such overalls manufactured under letters patent of the United States; and, if so, under what patent?

Same objection.

Ans. They are, under patent 224,175.

Int. 9. When did the defendants first manufacture and sell overalls?

Same objection.

Ans. Since middle July, 1879.

33 Int. 10. State whether or not defendants have manufactured and sold overalls under said patent continuously since the date you have named.

Same objection.

Ans. They have.

Int. 11. Look at the pair of overalls offered as an exhibit in the deposition of Alonzo J. Parker and identified by his initials on the tag, and state if it is one of those manufactured by the defendants.

Same objection.

Ans. I think it is.

Int. 12. State whether said exhibit was manufactured by said defendants under said letters patent and manufactured and sold overalls like it.

Same objection.

Ans. I think so, and they have.

Int. 13. When did they begin to manufacture and sell overalls like the exhibit?

Same objection.

Ans. Since July, 1879, under the patent. We made similar goods since July, 1879.

Int. 14. Note the peculiarity of the fly opening and the extension of the button-hole strip under the button strip in the exhibit, and state whether or not the defendants have manufactured and sold overalls so made since March 22, 1881, and prior to April 13, 1885.

Same objection.

Ans. They have manufactured and sold overalls so made since July, 1879.

34 Int. 15. This applies to the peculiarity in the fly you were requested to note, as well as to the other parts of the make?

Same objection.

Ans. It applies to the fly.

LESTER C. BISSELL.

STATE OF IOWA, } ss:
Dubuque County, }

Subscribed and sworn to before me by the affiant, Lester C. Bissell, this 13th day of February, A. D. 1886.

C. E. LYON,
Notary Public of Iowa in and for Dubuque Co.

(C.)

UNITED STATES OF AMERICA, }
City of Dubuque, Julian Township, Dubuque County, and State of Iowa, } ss:

I, C. E. Lyon, a notary public of Iowa, in and for Dubuque county, and examiner herein, by consent, to wit, in the case of Patent Clothing Company (Limited) *vs.* H. B. Glover *et al.*, pending in the circuit court of the United States in and for the second circuit and southern district of New York, duly authorized and empowered to

take such evidence as might be adduced by the complainants before me to be used in said cause, which evidence is hereto prefixed, do hereby certify that on the day named in the foregoing evidence and caption hereof I was attended at my office, on the southeast
35 corner of Fifth and Main streets, in the city of Dubuque, State of Iowa, by the counsel of the respective parties herein (Patent Clothing Company, Limited, *vs.* H. B. Glover *et al.*) and by several witnesses, to wit, Alonzo J. Parker, of Dubuque, Iowa; John B. Glover and Lester C. Bissell, both of the same place, Dubuque, Iowa; that each of said witnesses, being of sound mind and lawful age, was by me first duly cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth in said cause above named, and was then carefully examined, and the said witnesses did thereupon depose as appears in the foregoing depositions, which depositions were reduced to writing by me in the presence of said witnesses, and when completed were read over to said witnesses and signed and sworn to by them as and for their respective depositions.

I further certify that I was not of counsel or attorney to either or any of the parties in said cause, nor in any manner whatsoever interested in the event of this cause.

I further certify that in the taking of said evidence I have complied in all respects with the requirements of the 67th rule in equity, as amended, of the Supreme Court of the United States, and I herewith transmit said evidence, together with the exhibit marked "A," offered in connection with the deposition of Alonzo J. Parker and identified by his initials, and also by my hand and seal, under my seal of the clerk of the court in which said case is pending.

In testimony whereof I have hereunto set my hand and seal this 13th day of February, A. D. 1886.

C. E. LYON,
Notary Public of Iowa in and for Dubuque.

36 U. S. Circuit Court, Southern District of New York.

PATENT CLOTHING COMPANY (Limited) *vs.* H. B. GLOVER *et al.* } Suit No. 1.

Testimony on behalf of the complainants taken before James A. Renwick, one of the standing examiners of the circuit court of the United States for the southern district of New York, under and pursuant to the 67th equity rule of the Supreme Court of the United States, as amended.

NEW YORK, *November* 23, 1885—12 m.

Parties meet pursuant to notice.

Present: Wm. A. Jenner, on behalf of complainant; G. M. Plympton, Esq., on behalf of defendants.

Complainant's counsel offers in evidence certified copy of reissued letters patent to Rodmond Gibbons, No. 9616, and the same is

marked "Complainant's Exhibit Gibbons' Patent, J. A. R., examiner."

EDWARD S. RENWICK, a witness produced on the part of
37 the complainant, having been duly cautioned and sworn in the above cause, in answer to questions put by Mr. JENNER deposes and says as follows:

1 Q. What is your name, age, residence, and profession?

A. Edward S. Renwick; 62 years; Milburn, New Jersey, my place of business being in the city of New York. I am by profession a civil and mechanical engineer, but for thirty-five years last past I have been engaged mainly in the occupation of expert in patent causes and solicitor of patents.

2 Q. Have you read and do you understand certified copy of complainant's reissue letters patent to R. Gibbons, dated March 22, 1881, and No. 9616?

A. I have read a certified copy of the said reissue letters patent and believe that I understand the contents thereof, and the construction and operation of the pantaloons described and represented therein.

Counsel for the defendants at this point stated that he is informed, and on the strength of that information admits, that the pair of overalls like those which are marked "Complainant's Exhibit Defendants' Overalls No. 1, J. A. R., examiner," were manufactured and sold by the defendants prior to the commencement of this suit.

3 Q. Will you look at the pair of overalls marked Complainant's Exhibit Defendants' Overalls No. 1 and compare the same with the reissue Gibbons patent in suit, and state whether or not in your opinion the said pair of overalls contains the invention described in said patent and claimed in the second claim thereof, and give your reasons for your opinion?

38 A. I have examined the overalls marked "Complainant's Exhibit Defendants' Overalls No. 1," and have compared them with the description of the Gibbons reissue letters patent No. 9616, and I find that the said defendants' overalls contains, in substance, the combination which is recited in the second claim of the said Gibbons reissue for the following reasons:

As I understand the said Gibbons reissue patent, the improvement which is recited in the second claim thereof has reference to the fly portion of a pair of pantaloons or other similar garments—*i. e.*, it has reference to the front opening of a pair of pantaloons or other similar garment, which opening has at one side of it the button strip to which the buttons are secured, and has at the other side of it the button-hole strip in which the button-holes are formed, and which is inside of the front of the garment, so that when the buttons are buttoned in the button-hole strip they are concealed from view by the front of the garment which overlaps the button-hole strip. The object of the improvement is to prevent any stretch of the cloth or rupture of the stitching at the crotch of the said fly portion of the garment, which rupture is apt to take place in practice by the pull-

ing apart of the two sides of the fly portion of the garment, and the improvement of the second claim, as I understand the reissue, is the combination of the fly portion of the garment with what is called a "check piece," which crosses the crotch of the said fly portion, the said check piece being made integral or in one piece with the button-hole strip of the said fly portion and being extended upward and secured to the button strip at the opposite side of the said fly portion, so that when the two sides of the fly portion of the garment are pulled apart the extension of the button-hole strip across the seam at the crotch receives the strain and prevents the seam at the crotch from being ruptured by that strain.

39 Now, I find that the said Complainant's Exhibit Defendants' Overalls have a fly portion which corresponds with the fly portion of the pantaloons or other similar garment described in the said Gibbons reissue, the said fly portion of the said defendants' overalls having at one side the button strip to which the buttons are secured and having at the other side the button-hole strip, which is secured to the garment and is overlapped by the front portion thereof, so that the buttons, when buttoned into the button-hole strip, are concealed from view. I further find that the said defendants' overalls correspond substantially with the improvement recited in the second claim of the said reissue in the respect that the said fly portion thereof is combined with a check piece, which is in one piece with the button-hole strip and is extended upward and secured to the button strip of the said fly portion of the garment, with the same practical result as is accomplished by the improvement recited in the said Gibbons reissue.

When making the foregoing statement I had in mind the fact that in the form in which the improvement is represented in the drawings of the Gibbons reissue the extension of the button-hole strip, which forms the check piece by being extended upward and being made fast to the button strip, is lapped upon the front side of the button strip, whereas in the defendants' overalls the corresponding extension of the button-hole strip, which is extended upward from the crotch along the button strip, is lapped behind the button strip, to which it is secured. I am, however, of the opinion that the said variation in the lapping of the extension of the button-hole strip does not prevent the said defendants' overalls from embodying in substance the combination which is recited in the second claim of the said Gibbons reissue, first, because there is no language

40 in the said reissue, that I am aware of, that restricts the combination which is recited in the second claim to the lapping of the check piece upon the front side of the button strip, and, secondly, because it is immaterial for practical purposes whether the check piece, which is of one piece with the button-hole strip, be lapped at the front side or at the rear side of the button strip, because in either case the check piece crosses the seam at the crotch of the fly portion and sustains the strain which otherwise would bear upon that seam.

I also had in mind the fact that in the form in which the improvement is represented in the drawings of the said Gibbons reissue the

seam at the crotch of the garment is not extended quite up to the check piece, whereas in the defendants' overalls the corresponding seam is extended up to the check piece. I am, however, of the opinion that this variation does not prevent the defendants' overalls from embodying in substance the improvement which is recited in said second claim, because there is no language in the said Gibbons reissue that I am aware of which restricts the combination of said second claim to a garment in which the seam of the crotch of the fly portion is not continued up to the check piece, and because, whether the said crotch seam be continued up to the check piece or be stopped short of the check piece, the said crotch seam is in each case protected from a rupturing strain by the check piece, which crosses it and sustains that strain.

Cross-examination waived.

E. S. RENWICK.

Subscribed before me—
JAMES A. RENWICK,
United States Examiner.

Adjourned to meet at the office of Messrs. Wetmore & Jenner November 30, at 11 a. m.

41 Examination reopened, and the witness, E. S. RENWICK, is asked by Mr. PLYMPTON, defendants' counsel:

4 Q. Kindly look at the pair of green striped overalls which I hand you, and state whether or not, in your opinion, they are the same in construction as the overalls, Complainant's Exhibit Defendants' Overalls No. 1, concerning which you have testified; and, if you say yes, oblige me by marking on one of the pockets or otherwise something to identify them.

A. I have looked at the pair of green striped overalls exhibited to me, and have compared them with the Complainant's Exhibit Defendants' Overalls No. 1, and find that the two are practically identical as respects the construction of the fly portions thereof and the combination of the fly portion with a check piece which is integral with the button-hole strip of the fly portion. I have marked my name upon one of the pockets of the said overalls.

E. S. RENWICK.

Subscribed before me—
JAMES A. RENWICK,
United States Examiner.

NEW YORK, *November* 30, 1885.

Parties meet pursuant to adjournment.

Present: Counsel as before.

Complainant's counsel offers in evidence certified copy of the certificate of incorporation of the "Patent Clothing Company
42 (Limited)," and the same is marked "Complainant's Exhibit Certificate of Incorporation, J. A. R., examiner."

Also the original assignment of reissue letters patent No.

9616, Rodmond Gibbons to Patent Clothing Company (Limited), with certificate of record on April 16th, 1883. With respect to this exhibit it is agreed that this original exhibit need not be filed, but that a copy may be marked and used with the same force and effect as if original. The exhibit is marked "Complainant's Exhibit Assignment of Complainant's Gibbons's Patent, J. A. R., examiner."

Adjourned to meet on notice.

United States Circuit Court, Southern District of New York.

PATENT CLOTHING COMPANY
vs.
GLOVER.

Proofs for final hearing taken on the part of the complainant in rebuttal before me, James A. Renwick, one of the standing examiners of the United States circuit court for the southern district of New York, under and pursuant to rule 67 of the Supreme Court of the United States, in equity, as amended.

43 NEW YORK, *March* 10, 1887.

Met pursuant to notice.

Present: Causten Browne, Esq., for complainant; Gilbert M. Plympton, Esq., for defendant. Edward S. Renwick attends as a witness on behalf of the complainant.

EDWARD S. RENWICK, a witness recalled on behalf of the complainant herein, having been duly sworn in the cause aforesaid, deposes and says as follows:

1 Q. Mr. Earle, expert for the defendant, says in substance that the construction of the defendants' overalls, Complainant's Exhibit No. 1, is the construction which is referred to in the original and reissue patent of Gibbons as "the common construction of pantaloons." What is your opinion upon this question?

A. My opinion is that the construction shown in Complainant's Exhibit Defendants' Overalls No. 1 differs substantially from the construction referred to in both the original and reissue patent of Gibbons as "the common construction of pantaloons" in the respect that in the said common construction of pantaloons the button-hole strip does not extend across the point of the crotch of the fly upward along the lower end of the button strip and is not secured to the button strip by such extension, whereas in the said complainant's exhibit the button-hole strip extends across the point of the crotch of the fly portion of the garment and upward along the button strip and has the extension beyond the point of the crotch of the fly portion secured to the said button strip, so that the crotch of the fly portion is protected against injury from the effect of a strain incident to an extreme or sudden distension of the fly. In the
44 common construction of pantaloons referred to in both patents there is no such protection of the crotch against injury from any such strain, because there is no solid piece of cloth ex-

tended across the point of the crotch of the fly, and from the lack thereof the strain is resisted only by the stitches which connect the opposite pieces of the garment at and below the point of the crotch.

2 Q. Mr. Earle appears to be of the opinion that if the check piece described in the complainant's patent extend into the V opening of pantaloons down to the junction of the two sides or the crotch D of figure 2 of complainant's patent the Gibbons invention is not used. Do you agree with him in this respect; and, if not, why not?

A. I do not agree with Mr. Earle in the respect mentioned in the question. It appears to me that Mr. Earle's view is based upon an understanding that the constructions recited in the claims of both the original and reissued patents is restricted to one in which the length of the check piece between the two cross-seems that connect it with opposite sides of the fly portion of the garment in the vicinity of the crotch D must of necessity be so much less than the length of the portions of the button-hole strip and button strip between the same two seams that when the fly portion of the garment is distended there is a material space between the check piece and the crotch of the said fly portion, or, in other words, that the said check piece is then above the crotch. Now, I have not been able to find any language in either the original patent or in the reissue patent which places such a restriction upon the invention, and it is perfectly clear to my mind that so long as the crotch is protected against injury from a strain incident to the distension of the fly by means of a check piece such as is described in both of the said patents it makes no practical difference whether the length of the said check piece corresponds substantially with the lengths of the portions of the button-hole strip and of the button strip which are beneath it, or is shorter than the said lengths, because in both cases the rupturing strain is borne by the solid cloth of the check piece. The matter is, in fact, well set forth in the reissue patent in the second column of the first page, commencing at line ninety-one, in the following words:

"It will be seen that in a pair of pantaloons made according to my invention, carried out in either of the forms shown, any extreme or sudden distension of the fly that would otherwise tend to strain and rupture it at the point D will come wholly upon the check piece which extends across said point, and that thus the crotch D is perfectly protected against injury from the effects of any such strain."

I may add that Mr. Earle's view appears further to me to be erroneous, because, if he be correct, a pair of pantaloons which were made in precise accordance with the drawings of the patent, figures 1, 2, and 3, could be made to evade the patent and cease to embody the invention by simply sewing up the opening beneath the check piece represented in those figures. Thus if the garment should be originally made as illustrated by Complainant's Exhibit Gibbons' Construction 2 (A), which is a substantial embodiment of what is represented in the drawings, figures 1, 2, and 3, of each of the Gibbons patents, then the simple sewing up of the opening beneath the check piece as is effected by the blue stitches in Complainant's Exhibit Gibbons' Construction Claim 2^c would at once cause the gar-

ment to cease to embody the Gibbons invention, which conclusion appears to me to be absurd in view of the fact that in each
46 of the exhibits referred to by me any extreme or sudden distension of the fly that would otherwise tend to strain and rupture it at the point of the crotch will be borne by the solid cloth of the check piece which extends across that point, and because in each of said exhibits the check piece which protects the crotch against injury from the effects of such strain is made integral with the button-hole strip of the fly, as described in each of the said Gibbons patents and recited in the second claim of the Gibbons reissue patent.

I may add that the Complainant's Exhibit Gibbons' Construction Claim 2^c, when in its original condition, was made like the Complainant's Exhibit Gibbons' Construction Claim 2^A, and that before each of the said exhibits was exhibited to Mr. Earle by the counsel for the complainant I applied the blue stitching to Complainant's Exhibit Gibbons' Construction Claim 2^c at the request of the counsel for the complainant.

3 Q. Will you please read Mr. Earle's sixth answer and say whether you agree with him as to the supposed differences between the first and second claim of the Gibbons reissue so far as regards the infringement alleged in this case?

A. I have read the answer to Mr. Earle referred to in the question, and do not agree with him in all the opinions therein expressed. I do agree with him in the respect that the first claim of the reissue patent recites substantially the same invention which is recited in the claim of the original patent, and in the respect that (as I understand Mr. Earle's language) the said claim comprehends within its scope both varieties of construction in which the invention is represented as embodied in the drawings of the original patent, viz., the variety represented at figures 1, 2, and 3 of the drawings, in which the check piece is made integral with the button-hole strip of the fly portion of the garment, and the variety represented at
47 figure 4 of the drawings, in which the check piece is a separate piece of cloth from the the button-hole strip.

I do not agree with Mr. Earle in the opinion that the invention so claimed in the first claim of the reissue patent and in the claim of the original patent is an improvement wholly and substantially different in construction and operation from that found in the defendants' overalls, because, as I understand the improvement which is recited in the first claim of the reissue patent and in the claim of the original patent, the construction found in Exhibit Defendants' Overalls is substantially the same as that recited in each of the said two claims, for the following reasons: The construction in the said Exhibit Defendants' Overalls is in the fly or fly portion of pantaloons or similar garments, as recited in each of the said claims. In the said Exhibit Defendants' Overalls there is an inelastic bridge or check piece arranged across the crotch of the fly of the pantaloons, as recited in each of said claims. In the Exhibit Defendants' Overalls, moreover, the strain at the crotch, when the fly is open and spread apart, is received by the said bridge or check piece, as recited in the

claim of the original patent and as recited in substance in the first claim of the reissue patent. Moreover, in the said Exhibit Defendants' Overalls the check piece is constructed in one of the two plans represented in the drawings of both the original and reissue patents at figures 1, 2, and 3, the check piece being integral with the button-hole strip. When making this statement I have had in mind the fact that the portion of the check piece in Exhibit Defendants' Overalls which is made fast to the button strip is lapped behind the button strip, whereas in the said figures of the Gibbons patents the corresponding portion of the check piece, which is an exten-
48 sion of the button-hole strip, is lapped upon the front side of the button strip; but I do not regard this difference as preventing the Exhibit Defendants' Overalls from embodying in substance the improvement which is recited in the claim of the original patent and in the first claim of the reissue patent, for the same reasons which I have given when speaking with reference to the same difference in my former deposition in this case.

I also had in mind another difference which I referred to in that deposition, viz., that in the drawings of both the original and reissue patents the seam at the crotch of the garment is not extended quite up to the check piece, whereas in the Exhibit Defendants' Overalls the corresponding seam is extended up to the check piece. I am, however, of the opinion that this variation does not prevent the said Exhibit Defendants' Overalls from embodying in substance the improvement which is recited in the claim of the original patent and in the first claim of the reissue patent, because there is no language that I have been able to find, either in the original patent or in the reissue patent, which restricts the improvement recited in the claim of the original patent and in the first claim of the reissue patent to a garment in which the seam of the crotch of the fly portion is not continued up to but stops short of the check piece; and because, whether the said seam be continued up to the check piece or be stopped short of it, the crotch is protected against injury from the effects of a distending strain identically in the same manner and by the same means—*i. e.*, by the strain being borne by the check piece which extends across the point of the crotch.

I do not agree with Mr. Earle in the opinion expressed by him as to his understanding of the second claim of the reissue patent, and that it is materially different from the first claim in being
49 broader in its scope than that claim. As I understand the subject-matter of the two claims of the reissue patent, the first claim thereof is broader in scope than the second, because the first comprehends both varieties of construction of the fly piece, which are represented in the drawings of the original patent and of the reissue patent, viz., that variety which is represented by Figs. 1, 2, and 3, and that variety which is represented by Fig. 4; whereas the second claim of the reissue patent, as I understand it, comprehends only that one of the two varieties of construction which is represented in the drawings of both patents at Figs. 1, 2, and 3, in which the check piece is integral with the button-hole strip of the fly of the garment, and does not include the other variety of

construction, represented at Fig. 4 of both patents, in which the check piece is a separate piece of cloth from the button-hole strip. I also do not agree with Mr. Earle in the understanding that the second claim "may be understood to include the reinforcement of the crotch at the fly, irrespective of any peculiarity of construction," because, as I understand the said second claim, it is restricted to the protection of the crotch at the fly by means of a check piece which extends across the point of the crotch, and is restricted further to the peculiarity that such check piece is made integral with the button-hole strip of the fly.

I do not agree with Mr. Earle in the opinion that the opportunity for inserting a second claim, more comprehensive than the claim of the original patent, seems to have been the object of the reissue, because, as I understand the second claim of the reissue patent, it is less comprehensive in its scope and more restricted than the claim of the original patent, as the latter comprehends both varieties of construction which are represented in the drawings of the
50 original patent, whereas the said second claim comprehends only that one of the two varieties which is represented at Figs. 1, 2, and 3, and which has the check piece constructed integral with the button-hole strip.

Mr. Earle is mistaken in his statement that I excluded the first claim of the reissue in considering the question of infringement of defendants' overalls upon said reissue patent, the fact being that I did not express any opinion upon the subject in my former deposition, simply because no question was put to me to call forth such an opinion, and I did not consider it my duty to volunteer one.

Adjourned to to-morrow at 11 a. m.

MARCH 11TH—11 a. m.

JOHN D. VERMEULE appears in obedience to a *subpœna duces tecum* served at the instance of the complainant, and, being duly sworn, says in answer to interrogatories for the complainant as follows:

1 Q. What is your name, age, residence, and occupation?

A. John D. Vermeule; 60 years old; 9 West 47th street, in the city of New York; and am president of the Goodyear India Rubber Glove Manufacturing Company.

2 Q. Have you been subpœnaed to appear here and produce the factory clothing order books of the Goodyears India Rubber Glove Manufacturing Company for the years 1866 to 1870, both inclusive?

A. Yes.

3 Q. Have you the said books here with you?

A. I have not.

4 Q. Why have you not brought them?

A. They belong to the company and are not in my custody, nor have I the right.

51 5 Q. What officer of the company has the right to bring these books here on a subpœna?

A. I don't think any officer of the company has the right.

6 Q. What person not an officer of the company has the right?
A. I don't think any person has the right.

And, being cross-examined by Mr. PLYMPTON, says as follows:

7 X Q. Personally, have you any objection to produce the books named in the subpœna?

Objected to as immaterial.

A. None at all.

8 X Q. State whether a request to produce the books named in the subpœna and others at the office of Mr. Plympton, defendants' counsel, at or about the time you testified on the part of the defendant was refused by you for the reasons named this morning.

Objected to as immaterial.

A. Yes.

9 X Q. State whether you or your company are interested directly or indirectly in this suit.

Objected to as immaterial.

A. We are not.

JOHN D. VERMEULE.

Examination of EDWARD S. RENWICK resumed:

4 Q. The original patent of Gibbons uses this language: "The lower end of the button-hole strip does not extend down and
52 fasten into the crotch *d* as in the common construction of pantaloons, but bridges over the crotch, being securely stitched at *e* to the button strip *a*." The corresponding passage of the reissue patent reads thus: "The lower end of the button-hole strip *c* is not merely extended down into and fastened at the crotch *d*, as is the case in the common construction of pantaloons, but bridges over and extends beyond the crotch *d*, and is securely stitched to the button strip *a*, as shown at *e*." Comparing these two passages, will you say whether you see any material difference as to the construction which is described as the common construction or as to the substance of the change of construction which the patentee professes to have introduced, and will you also give such explanations as you deem necessary to a clear understanding of your views?

Objected to because the sentence quoted from the original patent is incomplete to a proper understanding of it. These words which follow should be included in the question: "The button-hole strip is also firmly secured at *f* below the lower button-hole." The question is also objected to, inasmuch as it calls for a construction of the wording of the two patents.

Will you please take into account, as suggested by the objection, the words quoted in the objection and the corresponding words in the reissue?

A. As I understand the description of the two patents referred to in the question, they do not differ as to the mechanical construction of the parts mentioned in them, and the word "merely," which is

used in the quotation from the description of the reissue patent,
53 appears to me to be used in the same sense as the word simply.
As I understand the description of the two patents referred to, they draw the same distinction between the common construction of pantaloons and the new construction which is made by the inventor, the distinction being that in the new construction the lower end of the button-hole strip extends beyond the crotch and is stitched to the button strip, whereas with what is spoken of as the common construction of pantaloons there was no extension of the button-hole strip beyond the crotch and no stitching of any extension of the button-hole strip to the button strip.

5 Q. Mr. Earle in his deposition repeatedly speaks of the defendants' overalls as distinguished from the construction in the Gibbons patent, in the fact that, as he says, the strain in the defendants' overalls is resisted "at" the crotch. Is it, in your opinion, material, upon the comparison of the two constructions, whether the strain is resisted at the crotch so long as it is not resisted by the crotch?

A. In my opinion, it is immaterial whether the strain is resisted at the crotch or above the crotch, so long as it is not restricted by the crotch. I may illustrate this statement by a reference to the three exhibits—Complainant's Exhibit Gibbons Construction Claim 2 (A), Claim 2 B, Claim 2 C. It will be noticed that in each of these exhibits the strain which tends to distend the fly portion of the garment is resisted by the check piece or bridge, which is an extension of the button-hole strip of the exhibit, and is not resisted by the crotch, and that it is wholly immaterial for the purpose of resisting the strain by the check piece when the fly portion of each exhibit is distended whether the check piece be a little above the crotch, as in Exhibit Claim 2 (A), so that you can see under it, or the check piece be close to the crotch, so that light is perceptible under it, or that the
54 check piece be not only close to the crotch, but stitched to the opposite sides of the fly portion, so that one cannot see under the check piece. In each of the three exhibits the strain is not resisted by the crotch, because the check piece is present in the exhibit to sustain the strain.

6 Q. Mr. Earle says in his eleventh answer that in the Gibbons construction the crotch of the old and well-known construction is preserved and an adjunct supplied in the shape of a bridge piece which spans the crotch, whereas in the defendants' construction the common construction at the crotch is altered by causing the end of one strip of the fly to pass or lap beyond the crotch onto the other part or side. Do you agree with him in his view?

A. I agree with him in part and differ from him in part. Thus it is true that in that mode of embodying the Gibbons invention which is represented at Fig. 4 of the drawings of both the original and reissue patents the crotch of the old and well-known construction is preserved, and a separate piece of cloth, c^2, is employed to form the bridge or check piece; but, on the other hand, in the mode of embodying the invention which is represented in Figs. 1, 2, and 3 the common construction at the crotch is altered by causing the end of the button-hole strip of the fly to lap beyond the crotch onto

the other part or side, which is the button strip, as distinguished from the old construction, which is well represented by "Complainant's Exhibit Old Construction," in which the lower end of the button-hole strip extended downward into the crotch seam below the crotch of the fly.

7 Q. In the same answer Mr. Earle speaks of the extension of one side of the stay piece beyond the crotch in the defendants' overalls as "avoiding the connecting seam between the two sides found
55 in Fig. 1 and Fig. 3 of the patent in suit and in the common, long-known construction." What do you understand this to refer to, and do you understand it to be material?

A. From what Mr. Earle did at the time of his cross-examination with the exhibits in his hands and from what he said I gathered that by the term connecting seam he meant what I have known to be called the "tacking," being a short cross-seam at the crotch of the fly portion of the garment seen in Complainant's Exhibit Old Construction. If that be the "connecting seam" to which he then referred I cannot find any representation of it either in Fig. 1 or in Fig. 3 of the patent in suit. There is, it is true, a dotted line extending crosswise of the check piece in Fig. 1, but such dotted line does not, to my mind, represent any seam, but represents the continuation of the line of fold of the outwardly turned leg of the garment where such line passes under the check piece. In Fig. 3 there is also a dotted cross-line, which is between the dotted lines representing stitches at *e* and *f*. This dotted line, however, does not denote to me a line of stitches, but denotes the line of the angle or crotch beneath the check piece.

If, on the other hand, by the term connecting seam Mr. Earle intended to refer to the seam which connects the two legs of the pantaloon below the crotch of the fly at *d* of the drawings I cannot perceive that there is any representation of this seam in either Fig. 1 or Fig. 3 of the drawings, and certainly it is not avoided in the defendants' overalls.

As I understand the matter, it is immaterial with the improvement set forth in the patent in suit whether the first connecting seam or "tacking" to which I referred be or be not applied to the garment, because the distending strain is with this improvement resisted by the check piece.

56 8 Q. Mr. Earle speaks of the expression "the check piece" as not found in the specification as he remembers. Please look at the reissue and original specifications and say how many times it is used in each and as designating what.

Objected to, as the question mistakenly quotes Mr. Earle's statement.

A. In the original patent the term "check piece" is used twice in the portion of the specification preceding the claim. In the reissue patent the term check piece is mentioned four times in the portion of the specification which precedes the claim. In each patent the term check piece is found in each claim. In every case in each patent the term check piece is used to designate the strip of cloth or other in-

elastic, pliable material by means of which the button-hole strip at one side of the fly portion of the garment is connected with the button strip at the other side thereof for the purpose of taking the strain which would otherwise rupture the crotch, and in each patent this strip of cloth is described as being constructed in two modes, viz: First, as in one piece with the button-hole strip of the garment, as represented at Figs. 1, 2, and 3; and, second, as a separate piece of cloth from the button-hole strip, but as secured to it, as represented at Fig. 4.

9 Q. In Mr. Earle's thirteenth answer he refers to three exhibits marked respectively Defendants' Exhibit Short-tail Rubber Coat, November 1, 1886; Defendants' Exhibit Long-tailed Rubber Coat, November 1, 1886, and *and* Defendants' Exhibit Ferguson No. 1, December 21, 1886. Please state whether you find in either of the two first-named exhibits, in combination with the fly portion
57 of the skirt of the garment, a check piece made integral with the button-hole strip of the fly, and adapted to prevent tension at the apex of the fly opening.

A. I do not. In Defendants' Exhibit Short-tailed Rubber Coat there is no button-hole strip, but the button-hole is made directly through the material of the body of the garment, and the stay or bridge piece is a separate piece of cloth which is cemented fast to the two sides of the opening in the split of the tail of the garment. This garment has no fly opening, there being in it no material or piece of material which corresponds with what is known as the fly in garments having a fly construction, such piece of material being a piece wide enough to contain the whole of the button-hole or button-holes, and being attached to the inner side of a garment which has the part of its body that is outside of such fly solid or without a button-hole or button-holes and adapted to cover and conceal the button-hole or button-holes in the fly and the buttons when they are buttoned into the button-holes of the fly.

In Exhibit Long-tailed Rubber Coat there is a button-hole strip which is made separate from the body of the garment and is cemented to the outer side thereof, this button-hole strip being about an inch and a half in breadth and extending upward from, at, or near to the bottom of the garment upward beyond the crotch of the split and terminating at a point about two inches above that crotch. This button-hole strip does not extend across the crotch of the split, and it is not a fly; moreover, there is no part of the material of the body of the garment outside of it to conceal the button-holes or the buttons when buttoned into such button-holes. There is in this garment a stay or check piece to resist a distending strain at the crotch of the split. This stay, however, is not a part of the button-hole strip or integral with it, but is formed of a narrow piece
58 of fabric of about half the width of the button-hole strip and is at the inner side of that strip. This narrow strip is solidly cemented to the button-hole strip, and forms what I have understood to be commonly known as a facing therefor; and the button-hole cuts directly through this facing, so that if the attempt should be made to attach the inner edge of this facing to the button-hole strip

by a continuous seam that seam would extend across the button-hole and prevent a button such as is applied to this garment from being buttoned in the button-hole. This garment has no fly or portion of it corresponding with what I have stated in the preceding part of the answer as known as the fly of a garment.

10 Q. Will you look at the exhibits of the defendant- which are marked respectively Defendants' Exhibit Chair Air Cushion, November 1, 1886; Water Bottle, November 1, 1886; Defendants' Exhibit D, October 29, 1886, and Defendants' Exhibit E, October 29, 1886, and Defendants' Exhibit Williams No. 1, Williams No. 2, November 27, 1886; Defendants' Exhibit A, October 29, 1886, and Defendants' Exhibit- B, C, and F, each, October 29, 1886, and state whether you find in any of these exhibits in combination with a fly portion of a garment a check piece made integral with the button-hole strip of the fly and adapted to prevent tension at the apex of the fly opening or any structure substantially the same in construction or mode of operation?

A. I have examined each of the exhibits mentioned in the question. I do not find in any one of them a fly portion of a garment, each of the said exhibits lacking anything corresponding with the fly of a garment, which, as I have previously stated, consists of a button-hole strip secured to the inner side of an opening of a garment and containing the button-holes, and which is loose from and covered by a portion of the garment outside of it, which
59 outside portion covers and conceals the button-holes and the buttons when buttoned into the button-holes. I do not find in any one of said garments a check piece made integral with a button-hole strip and adapted to prevent tension at the apex of a fly opening or any structure substantially the same in construction or mode of operation. Thus, in such a construction the button-hole strip not only forms the fly of the garment, but in addition forms a check piece to prevent a distension of the fly portion of the garment from rupturing the crotch of that fly portion, and no such construction or mode of operation exists in any one of the exhibits mentioned in the question.

11 Q. I will ask you the same question in regard to what is described in the Lubin patent of August 12, 1884.

A. I have examined the Lubin patent and believe I understand its contents and the construction of the overalls which are represented and described in it. I do not find in the Lubin patent either a description or a representation of the combination with the fly portion of a garment of a check piece made integral with the button-hole strip of the fly and adapted to prevent tension at the apex of the fly opening or any structure substantially the same in construction or mode of operation. There is described and represented in the Lubin patent the fly portion of a garment, the fly of which is a button-hole fly strip designated *m*. This button-hole strip, however, is neither integral with a check piece adapted to prevent tension at the apex of the fly opening nor does this button-hole strip have anything to do with the prevention of such tension. On the contrary, the tension at the apex of the fly opening is prevented by the

use of a strip designated H′ H′, which, instead of being integral with the button-hole strip, is a separate piece of material and
60 is not even connected with the button-hole strip *m*; so that the idea of either constructing a check piece integral with the button-hole strip or of so constructing the button-hole strip that it not only performs the function of a button-hole strip for the fly portion of a garment, but in addition (by reason of its extention across the apex of the crotch of the fly opening and its securement to the opposite side of the fly opening) prevents tension at the apex of the fly portion, is neither described nor suggested in the Lubin patent.

12 Q. Mr. Earle says in his thirty-third answer: "I have examined the two patents (of Gibbons), original and reissue, and do not find in either an indication of any importance or advantage in making the button-hole strip and stay in one and the same piece." Is Mr. Earle right in this?

A. According to my reading of the patent he is not right. Thus I find in the original patent the following statement:

"My improvement, as seen in the manner preferred by me, adds nothing to the cost of the garment, but rather cheapens its manufacture by causing the attachment of the lower end of the button-hole strip to be made at a point more easily reached than that at which the connection is ordinarily made."

What the patentee means in this paragraph by the words "in the manner preferred by me" is clear from the paragraph preceding the one which I have quoted, the manner preferred being that represented at figures 1, 2, and 3.

The corresponding paragraph in the reissue patent is in the following words:

"My improvement in the specific form seen at Figs. 1, 2, and 3, which show it carried out in the manner preferred by me,
61 adds nothing to the cost of the garment, but, instead, rather cheapens its manufacture, since the attachment to the garment of the lower end of the button-hole strip is affected at a point more accessible than that at which the connection by stitching has heretofore been made."

The preferred manner referred to in these quotations from the two patents is in each case that in which the check piece is made integral with the button-hole strip of the fly as represented in each patent at figures 1, 2, and 3.

And, being cross-examined by Mr. PLYMPTON, says:

13 X Q. You concede, I believe, that the thing which is marked Complainant's Exhibit Old Construction represents one common, old, and well-known form of making breeches, so far as the crotch is concerned?

A. So far as the mode of making the fly portion of breeches or pantaloons is concerned the exhibit mentioned in the question is a substantially correct representation of a common, old, and well-known form of it as made previous to and since the date of the Gibbons patent.

14 X Q. In regard to the crotch of the exhibit referred to in the

last question, do you find that the crotch in the exhibit is stayed or reinforced so that additional strength is given to the seams and construction of the crotch part?

A. I do not find that the crotch is stayed in any manner so that additional strength is given to it other than by the seams.

15 X Q. Do you find the seams in the exhibit referred to arranged or made in a manner that will prevent the ripping of the crotch part?

A. If by ripping in the question be meant what is generally understood by that term, viz., the pulling out of the stitches
62 or the cutting of them by a knife or scissors, there is nothing to prevent the ripping of the crotch part. If by ripping in the question be meant the rupture by a distending strain applied to the opening of the pantaloons, then I find in the exhibit the stitches of the seams which resist the pulling apart of the portion of the garment to the extent of their strength, and if the strain be less than the strength of the stitches of the seams they will prevent the separation of the parts of the garment.

16 X Q. Then do you wish to be understood as saying that you do not find any arrangement of seams or parts or construction in this exhibit, Complainant's Exhibit Old Construction, designed to give additional strength to the crotch of the exhibit apart from the ordinary construction, arrangement, or sewing?

A. I do not find in this Complainant's Exhibit Old Construction any arrangement or parts or construction designed to give additional strength to the crotch of the exhibit apart from the ordinary construction, arrangement, or sewing which I have always seen in this class of garments at the same part. Thus, there is in this exhibit the ordinary crotch seam or seams (there being sometimes one and sometimes two of these) extending from the apex of the crotch downward, and there is also in this exhibit the usual cross-tacking, which I have seen in garments of this class, at the upper end of the crotch seam or seams, and from the nature of the construction the extent — this cross-tacking is limited, as in the ordinary construction previous to the date of the Gibbons patents.

17 X Q. And the purpose of this cross-tacking is what?

A. I understand that it is to strengthen to the extent of its strength the junction of the two parts of the garment at the apex of the crotch—*i. e.*, to give the garment greater strength at that
63 portion than is given by the strength of the crotch seam or seams extending from the said apex downward.

Adjourned to to-morrow at 10.30 a. m.

NEW YORK, *March* 12, 1887—10.30 a. m.

Met pursuant to adjournment.

Present: Causten Browne, Esq., for complainant; G. M. Plympton, Esq., for defendant.

The examination of Edward S. Renwick is suspended by consent of counsel at the request of complainant's counsel in order that two witnesses present may testify.

C. N. Squires attends as a witness on behalf of complainant.

C. N. SQUIRES, a witness produced on behalf of complainant, having been by me first duly cautioned and sworn in the cause aforesaid to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. C. N. Squires; I am 55 years old; I live at Naugatuck, Conn.; I am an India-rubber worker.

2 Q. Were you ever in the employment of the Goodyear India Rubber Glove Manufacturing Company at Naugatuck, Conn.?

A. Yes, sir.

3 Q. When did you go into the employment of that company?

64 A. In 1862.

4 Q. And when did you leave the company?

A. Two years last September.

5 Q. How were you employed at first in the company's service?

A. As a cutter of rubber clothing.

6 Q. How long were you so employed?

A. About three years.

7 Q. And after that what was your position?

A. Superintendent of the clothing department.

8 Q. And did you continue to be such superintendent until you left them two years ago?

A. Yes, sir.

9 Q. While you were such superintendent did the orders for clothing to be made in the company's works pass through your hands?

A. Yes, sir.

10 Q. Do you remember the fact that at some time while you were in the company's employment (I do not now ask you when it was) the company began to make India-rubber coats slit up behind farther than had been the custom before, such long-slit coat tails being provided with buttons?

A. Yes, sir.

11 Q. Will you state what had been the length of slit before that and what was the length of the extra long slit of which we are speaking?

A. Twelve inches was the first one or short slit. The extra long was 18, 24, and 30 inches.

12 Q. Do you remember what it was that led to the Goodyear Company manufacturing such extra long slit goods?

A. Making India-rubber ulster coats.

13 Q. And what led them to go into that?

A. Copying from the English cloth ulster coats.

65 14 Q. What English cloth ulster coats do you refer to?

A. The style worn by the Englishmen who came over to the Centennial.

15 Q. In 1876, you mean?

A. Yes.

16 Q. If I understand you correctly the Goodyear Glove Company

began to make India-rubber ulsters, following the fashion in cloth ulsters introduced by Englishmen who came here to the Centennial?

A. Yes, sir.

17 Q. Did these India-rubber ulsters have the extra long slit?

A. Yes, sir.

18 Q. Were they plain lined or fancy twist?

A. Plain lined.

19 Q. Did they have an independent button-hole strip behind, or were the button-holes cut in the garment, as shown, for example, in Defendants' Exhibit Short-tail Rubber Coat?

Objected to as a leading question.

A. They were cut through like this sample (referring to Defendants' Exhibit Short-tailed Rubber Coat).

20 Q. What was the next description of long slit-tail coats that the Goodyear Glove Company made?

A. They were an extra long coat called the "Mountaineer."

21 Q. As to these Mountaineers coats what was the arrangement of button-holes?

A. They were cut through, the same as the sample (referring to Defendants' Exhibit Short-tailed Rubber Coat).

22 Q. What was the next description of long slit-tailed coats that the company made?

66 A. They were a long serge and check coats.

23 Q. You mean lined with serges and checks?

A. I do.

24 Q. By what general name was this last description of coat known?

A. The name was serge and checks.

25 Q. Were they also known as officers' coats?

Objected to as leading.

A. Not at the factory.

26 Q. Do you remember how the first of these last-named coats were lined, whether with serge or with check?

A. With serge.

27 Q. Do you remember from whom the pattern, if any, by which they were made came?

A. From Mr. Hodgman.

28 Q. Will you look at the coat marked Defendants' Exhibit Ferguson No. 1 and say whether the Goodyear Glove Company began to make coats having an independent button-hole strip in the tail, as shown in that exhibit, while you were employed there as superintendent of the clothing department?

A. They did not make them for stock.

29 Q. Explain what you mean by the words for stock.

A. Coats ordered for the store in New York.

30 Q. Do you mean that they did not make them for stock at any time while you were in their employment?

A. I don't remember that they did.

C. N. SQUIRES, a witness produced on behalf of complainant, having been by me first duly cautioned and sworn in the cause aforesaid to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. C. N. Squires; I am 55 years old; I live at Naugatuck, Conn.; I am an India-rubber worker.

2 Q. Were you ever in the employment of the Goodyear India Rubber Glove Manufacturing Company at Naugatuck, Conn.?

A. Yes, sir.

3 Q. When did you go into the employment of that company?

64 A. In 1862.

4 Q. And when did you leave the company?

A. Two years last September.

5 Q. How were you employed at first in the company's service?

A. As a cutter of rubber clothing.

6 Q. How long were you so employed?

A. About three years.

7 Q. And after that what was your position?

A. Superintendent of the clothing department.

8 Q. And did you continue to be such superintendent until you left them two years ago?

A. Yes, sir.

9 Q. While you were such superintendent did the orders for clothing to be made in the company's works pass through your hands?

A. Yes, sir.

10 Q. Do you remember the fact that at some time while you were in the company's employment (I do not now ask you when it was) the company began to make India-rubber coats slit up behind farther than had been the custom before, such long-slit coat tails being provided with buttons?

A. Yes, sir.

11 Q. Will you state what had been the length of slit before that and what was the length of the extra long slit of which we are speaking?

A. Twelve inches was the first one or short slit. The extra long was 18, 24, and 30 inches.

12 Q. Do you remember what it was that led to the Goodyear Company manufacturing such extra long slit goods?

A. Making India-rubber ulster coats.

13 Q. And what led them to go into that?

A. Copying from the English cloth ulster coats.

65 14 Q. What English cloth ulster coats do you refer to?

A. The style worn by the Englishmen who came over to the Centennial.

15 Q. In 1876, you mean?

A. Yes.

16 Q. If I understand you correctly the Goodyear Glove Company

began to make India-rubber ulsters, following the fashion in cloth ulsters introduced by Englishmen who came here to the Centennial?

A. Yes, sir.

17 Q. Did these India-rubber ulsters have the extra long slit?

A. Yes, sir.

18 Q. Were they plain lined or fancy twist?

A. Plain lined.

19 Q. Did they have an independent button-hole strip behind, or were the button-holes cut in the garment, as shown, for example, in Defendants' Exhibit Short-tail Rubber Coat?

Objected to as a leading question.

A. They were cut through like this sample (referring to Defendants' Exhibit Short-tailed Rubber Coat).

20 Q. What was the next description of long slit-tail coats that the Goodyear Glove Company made?

A. They were an extra long coat called the "Mountaineer."

21 Q. As to these Mountaineers coats what was the arrangement of button-holes?

A. They were cut through, the same as the sample (referring to Defendants' Exhibit Short-tailed Rubber Coat).

22 Q. What was the next description of long slit-tailed coats that the company made?

66 A. They were a long serge and check coats.

23 Q. You mean lined with serges and checks?

A. I do.

24 Q. By what general name was this last description of coat known?

A. The name was serge and checks.

25 Q. Were they also known as officers' coats?

Objected to as leading.

A. Not at the factory.

26 Q. Do you remember how the first of these last-named coats were lined, whether with serge or with check?

A. With serge.

27 Q. Do you remember from whom the pattern, if any, by which they were made came?

A. From Mr. Hodgman.

28 Q. Will you look at the coat marked Defendants' Exhibit Ferguson No. 1 and say whether the Goodyear Glove Company began to make coats having an independent button-hole strip in the tail, as shown in that exhibit, while you were employed there as superintendent of the clothing department?

A. They did not make them for stock.

29 Q. Explain what you mean by the words for stock.

A. Coats ordered for the store in New York.

30 Q. Do you mean that they did not make them for stock at any time while you were in their employment?

A. I don't remember that they did.

31 Q. How otherwise than for stock was rubber clothing made by the company? What I want to get at is the name given to that sort of manufacture which you would not call making for stock.

67 A. Coats cut to measure or specials.

32 Q. Do you remember any coats made on special orders with an independent button-hole strip behind like this Exhibit Ferguson coat before you left the Goodyear's Company?

A. I do not.

33 Q. Will you look at the coat which I now hand you and state whether that is a reversible coat of the Goodyear Company's manufacture?

The coat referred to is put in evidence for the complainant and marked Complainant's Exhibit Goodyear Glove Company Reversible Coat.

A. It is.

34 Q. When rubber coats are made with an independent button-hole strip for the slit in the tail how is it with the fronts?

A. The fronts are made the same way.

35 Q. Why would they not be made differently at the fronts from what they would be at the tail as respects the independent button-hole strip?

A. They wouldn't look right made that way.

36 Q. State whether it is a practical job to make a reversible coat with independent button-hole strip for the fronts and tails?

A. It is not.

37 Q. Explain briefly why not.

A. It would leave this outside piece on both sides loose, as there would be nothing to hold it together.

38 —. What do you mean by this outside piece? Do you mean the outside flap which covers the buttons when they have been put through the button-holes in the independent button-hole strip?

A. I do.

68 39 Q. Do you remember Mr. Glover, one of the defendants, being of the Goodyears Company's factory, at Naugatuck, some months ago?

A. Yes, sir.

40 Q. About how long ago was it?

A. Some time within three months, I should say.

41 Q. Were you sent for from the factory to come up there and meet him?

A. Yes, sir.

42 Q. And did you go?

A. Yes, sir.

43 Q. Did Mr. Glover, on that occasion, have the factory clothing order-books submitted to him for examination?

A. Yes, sir.

44 Q. And did he examine them?

A. Yes, sir.

45 Q. With your assistance?

A. Yes, sir.

46 Q. When any new style of garment was ordered to be made for stock at the factory, what, if anything, was entered in the factory clothing order books by way of directions in regard to such new article?

Objected to, as the books referred to appear to be in existence and should be produced, and as it appears from a letter dated the 11th of March, 1887, and directed to defendants' counsel it is possible to obtain the books, and defendants' counsel puts in evidence the letter referred to written by the witness John D. Vermeule, and requests that it be marked as Defendants' Exhibit Vermeule Letter.

69 The introduction of the Vermeule letter is objected to by the complainant as irregular and incompetent.

A. The description of the article wanted was written in the order book.

Cross-examined by Mr. PLYMPTON, witness says:

47 X Q. Mr. Squires, do I understand you to correctly say that prior to the Centennial Exhibition of 1876 the Goodyears India Rubber Glove Company never made any coats with long tails—say tails having the length of this coat, Ferguson No. 1?

Objected to as liable to mislead, because not distinguishing between long tails and a long slit.

Counsel asks complainant's counsel to please not suggest to the witness his answer to the questions.

A. I find no records in my order book for long slits prior to 1876.

48 X Q. Will you please answer my question, which I now repeat?

A. I don't remember that they did.

49 X Q. Do you say that during your employment by the company referred to they never, prior to the Centennial of '76, made rubber coats with tails as long as that shown in the Ferguson Exhibit Coat; and do you make such a statement positively and with full recollection of all the facts?

A. I can't remember that they did.

50 X Q. Is this the best answer that you can now give regarding the matter inquired about?

A. Yes, sir.

51 X Q. You have said or left it be inferred that the
70 making of the long-tailed coats, with the long slit in the tail, was suggested to your company by the ulsters worn by English visitors at the Centennial. Am I correct?

A. Yes, sir.

52 X Q. Now, carefully point out in all the details, describing as fully as you can, the features that correspond with the English ulster coats as you find such features reproduced in the Exhibit Ferguson No. 1.

A. That exhibit is not an ulster at all.

53 X Q. I suppose that from the nature of your business you are

familiar with the various kinds of water-proof coats of all kinds that were in the market from 1863 up to date?

A. Yes, sir.

54 X Q. Then you have probably observed and knew all about the common carmen's, fishermen's, and sailors' yellow oiled duck overcoats that have been worn and were in common use, to my knowledge, for the past fifty years, were you not?

Counsel's statement of his knowledge objected to.

A. I know nothing about the cut or make of them.

55 X Q. Please answer my question.

(The question being repeated, witness answers:)

A. No, sir.

56 X Q. Do you say that prior to 1876 and many years prior to that date you had never noticed the yellow oiled coats I have referred to?

A. I never have.

57 X Q. Prior to 1876 do you say that you never noticed overcoats with long tails, such, for instance, as have been worn by the soldiers and by citizens for a great many years?

71 A. I remember the soldiers' coats.

58 X Q. And not the citizens' long-tailed coats?

A. Yes; I remember the citizens' coats.

59 X Q. Now, will you state the purpose of making the long slit of eighteen, twenty-four, and thirty inches in the long-tailed coats you have referred to as being made by the Goodyear India Rubber Glove Company, and why in such long-tailed coats would not the shorter slit you have referred to in connection with the short-tailed coats answer the purpose.

A. The thirty-inch slit was made for horseback riding; the twenty-four and eighteen I never knew the object.

60 X Q. But you made them at the factory?

A. Yes, sir.

61 X Q. Now answer the fifty-ninth cross-question.

A. The short-tailed coat a man could not ride horseback in and have it cover his legs.

62 X Q. And for that purpose was the long slit made in the long-tailed coats?

A. Yes, sir.

63 X Q. If for any other purpose, name it.

A. I don't know of any other.

54 X Q. Look at the Exhibit Ferguson No. 1 and state if that exhibit is what you have known as a long-tailed coat, and give me the length of the slit in the tail.

A. This is a long-tailed coat, and the length of the slit is eighteen inches.

65 X Q. The Exhibit Ferguson is therefore made for horseback riding, is it?

A. No, sir.

66 X Q. For what purpose, if you know, was that exhibit made, or coats like it?

A. I do not know.

67 X Q. Referring once again to the soldiers' and citizens'
72 long-tailed overcoats that you say you knew about prior to 1876, do you remember whether the tails of these coats were slit up and provided with buttons to close the slit or not?

A. I should say that cavalrymen's overcoats were slit up for horseback riding. To the best of my remembrance they had brass buttons to button through.

68 X Q. Why do you say to the best of your remembrance; are you not certain as to the fact inquired about?

A. No, sir.

69 X Q. Can you and will you enumerate the details of construction that entered into all of the different kinds of overcoats that were made by the Goodyears India Rubber Glove Manufacturing Company from the time of your first employment with the company, in 1883, to the time of your leaving them, about three years ago, taking them up in their order?

A. I can and I will. If I can find the kinds here (referring to the exhibits present) I will do so very quickly. There were sack coats similar to this, with no slits in the tail and no buttons on the collar; the officer coat like that; the reversible and non-reversible like that, with the exceptions only of buttons on one side in the non-reversible; the serges and checks like that; the ulsters and Mountaineers I find no samples of. They make a fireman's and a fisherman's coat that I do not find here; they also make a fine tourist's coat, so called. That is about all the styles that they make for regular stock work.

70 X Q. Have you answered the last question as fully as you can from your present recollection?

A. Yes, sir.

71 X Q. Do you know Mr. Ferguson, who has testified in this case?

A. Yes, sir.

73 72 X Q. How long have you known him?

A. I should say twelve or fifteen years.

73 X Q. And have you known him intimately during that time?

A. No, sir.

74 X Q. Is he a friend of yours and do you so regard him?

A. Merely an acquaintance.

75 X Q. Do you know the two ladies who have testified in this case?

A. Yes, sir.

76 X Q. Have you known them long?

A. Yes, sir; thirty years.

77 X Q. And have you known them well?

A. Yes, sir.

78 X Q. They are persons of respectability and good repute, I believe, are they not?

Objected to as immaterial.

A. Yes, sir.

79 X Q. And do you say the same of Mr. Ferguson, so far as you know?

Same objection.

A. Yes, sir.

80 X Q. Did the Goodyears India Rubber Glove Manufacturing Company, while you were employed by them, make overcoats at any time with fly fronts, so called, and as is represented in the Exhibit Ferguson Coat?

A. Yes, sir.

81 X Q. Are you certain of that?

A. Yes, sir.

74 82 X Q. Is there any practical difference in the mere construction of the fly front I have referred to and the buttoning arrangement as you find it in the Ferguson exhibit? In other words, is not the fly front of the Ferguson exhibit and the buttonhole part of the slit in the tail of that exhibit made practically alike?

A. With the exception of the stay they are practically alike.

83 X Q. I refer only to the fly part of the front and the slit, irrespective of the stay, which is not part of my question. With this explanation, what do you say?

A. They are alike.

84 X Q. Do you swear and, being mindful of your oath, can you say that there never were goods made at the factory of the Goodyears India Rubber Glove Manufacturing Company during your term of employment except the order was descriptively entered in the order book you have referred to?

A. No, sir.

85 X Q. By whom are you now employed, Mr. Squires?

A. By the Waterbury Rubber Company, at Waterbury, Connecticut.

86 X Q. And does that company make similar goods to the goods that are made by the Goodyear's India Rubber Glove Manufacturing Company?

A. They propose to do so.

87 X Q. Now, Mr. Squires, if within your knowledge, state whether it was understood by the trade and by yourself and others in the company that the Goodyears India Rubber Glove Manufacturing Company made a better class of goods and got better prices for them than did other companies engaged in the same line of industry.

A. Not in clothing, but in boots and shoes.

88 X Q. You have referred to Mr. Hodgman. Are they 75 rubber boot and shoe manufacturers, as well as makers of other kinds of rubber goods made by the Goodyears India Rubber Glove Manufacturing Company?

A. I think they make no boots and shoes, but they make clothing and sundries.

Redirect of Mr. SQUIRES:

89 Q. In your direct examination I asked you whether the Goodyears Glove Company began to make coats having an independent button-hole strip in the tail, as shown in the Exhibit Ferguson No. 1, while you were employed there as superintendent of the clothing department, and you answered that they did not make them for stock, and afterward that you did not remember that they made any on special orders. In so answering did you refer in your own mind to this particular feature of the Ferguson coat, that the button-hole strip of the tail extends across the crotch about half an inch and is cemented to the button strip, thus forming a stay?

This question is objected to as a leading question, and further that the witness answered the previous question fully to the best of his knowledge and recollection.

A. That is rather a long question. I did.

90 Q. Now, I want to show you a coat in which there is an extra long slit at the tail and an independent button-hole strip and in which the button-hole strip itself does not extend across the crotch so as to constitute the stay, but the stay is a separate piece cemented on and extending about three-quarters of an inch each way from the crotch. Now, will you tell me whether coats with extra long slits and independent button-hole strips and a separate stay piece,
76 as just explained, were made at the Goodyears Glove Company's factory at any time while you were superintendent of the clothing department.

Objected to as leading.

A. I don't remember.

91 Q. Do you mean that you do not remember whether there were or not, or do you mean that you do not remember their being made there?

Objected to as leading and fully answered.

A. I do not remember their being made there.

92 Q. You have said that when rubber coats are made with an independent button-hole strip for the slit in the tail the fronts are made in the same way. When rubber coats are made with an independent button-hole strip for the front, do such coats always have an independent button-hole strip for the tail?

A. The coats that I remember had no slits in the tail.

C. N. SQUIRES.

Adjourned to Monday, March 14th, at 11 a. m.

NEW YORK, *March* 14, 1887.

Met pursuant to adjournment.

William A. Jenner, Esq., for complainant; Gilbert M. Plympton, Esq., for defendant.

Cross-examination of EDWARD S. RENWICK continued:

18 X Q. At the close of your cross-examination prior to adjournment last Friday you remarked that you presumed the trousers you had on and the trousers I had on had the same construction
77 of crotch fastening as is shown in this exhibit, Complainant's Exhibit Old Construction, as an illustration of the commonness of such construction. State, if you can, approximately, how long you have known of this old construction referred to and shown in the exhibit named.

A. According to my recollection, pantaloons with the single opening in front, as distinguished from the previous mode of constructing them with a broad flap in front and an opening on each side, came into use when I was a boy at school, more than fifty years ago, but I have no recollection of noticing the exact mode in which pantaloons with the opening in front were then constructed. I recollect pantaloons made of the present construction, with the simple opening in front like Complainant's Exhibit Old Construction, previous to the year I left college, viz., 1839. I recollect them particularly from the fact that, when putting them on in a hurry, I have frequently ruptured the stitching at the crotch by catching my foot in it and have had to have the rupture sewed up.

19 X Q. This section, Complainant's Exhibit Old Construction, that we have been discussing is made with what you have hitherto defined as a fly front, is it not?

A. It is.

20 X Q. In this Exhibit Old Construction it appears to me that the lower continuation of the button side of the opening and the lower continuation of the button-hole side of the opening are placed one upon the other, so that the two sides of the opening referred to and the stitching therein pass or cross each other. Do you so find it?

A. Yes; that is so with the part to which the buttons are secured on one side and the part on the other side which covers over and conceals the button-hole strip and the buttons when buttoned
78 into that strip. The button-hole strip also has its lower end from the apex of the opening downward extended in between the two parts previously mentioned by me, so that it overlaps the side to which the buttons are sewed and is overlapped itself by the other side of the garment.

21 X Q. It appears to me that in this Exhibit Old Construction both the button side and the button-hole side of the opening are continuous from the places where each of these two sides commence, at the waistband, to and below the place where the lower prolongation of the button and button-hole sides lap each other, as stated in your last answer. Do you so find it?

A. Each of the sides of the opening which I understand to be referred to in the question, viz., the side to which the buttons are attached and the opposite side which covers the button-hole strip and conceals the buttons when buttoned into that strip, is continuous from the waistband downward to and below the apex or angle

of the opening and consequently throughout the whole extent of the opening from the waistband downwards.

22 X Q. Supposing that garments having the construction of front or fly opening in the particulars we have been discussing and as the Exhibit Old Construction shows had first been made or sold subsequently to the date of June 6th, 1876 (Gibbons' original patent), would such a garment, in your opinion, come within the descriptions and claim of that original patent, as you understand it?

A. Such garments would certainly not come within the claim of the said original Gibbons patent, because they lack any check piece arranged across the crotch of the fly opening in front and have no equivalent for such a check piece, and as such a check piece is a distinguishing characteristic of the improvement recited in
79 the claim such garments as those illustrated by Complainant's Exhibit Old Construction lack a distinguishing characteristic of the claim. Such garments also would not come within the description of the part of the specification preceding the claim so far as that description refers to and describes the construction recited in the claim, but the said garments would come within a part of the description which describes the common construction of pantaloons.

23 X Q. Suppose, Mr. Renwick, you should take garments having the construction shown in Complainant's Exhibit Old Construction, or, if you please, take that exhibit itself and add to it the bridge in the manner shown in Fig. 4 of Gibbons' original patent so that the bridge would have precisely the construction, application, and location as it is shown in Fig. 4, would you then say that the Exhibit Old Construction, with this addition, would come within the said original patent, description, and claim?

A. I should say that the garment changed as described in the question would come within the said original patent, description, and claim.

Adjourned to 1.30 p. m.

Redirect examination of EDWARD S. RENWICK:

24 R. D. Q. In your opinion would the construction described in the last cross-question, with the addition in said question mentioned, come within the description and either of the claims of the reissue patent in suit?

A. In my opinion it would come within the first claim of the reissue patent in suit, because, as I understand the combina-
80 tion recited in that claim, it is broad enough in its scope to include the combination of the check piece arranged as stated, whether the said check piece be a separate piece from the button-hole strip or be integral with the button-hole strip of the fly.

The construction referred to, with the addition, would not, in my opinion, come within the second claim of the reissue patent in suit, because, as I understand the improvement recited in that second claim, it is restricted to the combination with the fly portion of the pantaloons of a check piece not only arranged substantially as re-

cited in the first claim, but, in addition, made integral with the button-hole strip, which would not be the case with the addition described in the last cross-question.

The construction referred to, with the addition, would come within the description of the patent preceding the claims so far as that description refers to the first claim; but it would not come within the particular part of the said description which I understand to be referred to by the second claim of the reissue patent.

25 R. D. Q. Mrs. Jane Ward, one of defendants' witnesses, in her deposition made herein and in cross-questions and answers 56 to 77, both inclusive, described or attempted to describe a reversible garment with fly piece or pieces. These questions and answers are as follows: "X 56. Referring now to the reversible coats, of which you have spoken, how many sets of buttons did they have in front? A. Two sets. X 57. One inside and one out? A. Yes. X 58. How many sets of button-holes in front? Please answer without looking at the Exhibit Ferguson No. 1, which you have in your hands. A. One. X 59. How many buttons made a set? A. Twelve on a reversible coat. X 60. And of these buttons were six inside and six outside? A. Yes. X 61. Were the six inside buttons on the
81 opposite side of the combined fabric to that of the outside buttons? A. I don't fully understand that question. X 62. Were the twelve buttons on the same side of the front opening? A. They were. X 63. Then the six inside ones were behind the six outside ones on the opposite side of the fabric; is that correct? A. One button was opposite the other. X 64. How many button-holes were there in the front opening? A. I think there were six. X 65. Why did you take so long to answer the question? A. Thinking. X 66. Trying to think how many there was? A. Yes. X 67. The six button-holes were all on one side, were they not? A. Yes. X 68. And those front button-holes, were they in the main body of the coat or were they in a fly piece, as are the button-holes in Exhibit Ferguson No. 1, which you have in your hands? A. They were on the coat. X 69. Well, was there a fly piece for buttoning the front opening, as in Exhibit Ferguson No. 1? A. The same these was. X 70. I have meant by fly piece in Ferguson No. 1 the under piece which has the button-holes. Have you meant the same thing by fly piece in answer to the prior questions? A. On the reversible coat; not the fly. X 71. What do you mean by fly? Point out on Ferguson Exhibit No. 1. A. This piece. (The witness points out the under piece in the front of the coat containing the button-holes.) X 72. Then you meant by your answer prior to the last one that in the reversible coat the button-holes were in the coat part and not in the fly piece; is that correct? A. Yes; it is. X 73. In the reversible coat which was the outside—the rubber surface or the silk or the alpaca? A. It might be worn either side; to be worn either side. X 74. Let us call the rubber surface side the outside for the present. Now, on which side was the fly piece of the front opening on the outside—that is, the rubber side or the inside—that is, the
82 silk or lining side? A. On the left side of a reversible coat both inside and out. X 75. Then were there two fly pieces?

A. I think there was. X 76. Are you sure of it? A. I am. X 77. And they were both on the same side of the front opening? A. Yes."

Please state whether or not there is described therein a practical reversible garment, and give your reasons. I hand you a copy of the deposition of Mrs. Ward, and you may refer to any answer or question therein for reference that you may desire.

Objected to as not proper redirect of this witness.

A. I have read the questions and answers of Mrs. Jane Ward to which I have been referred in the question. In my opinion the reversible coat which is described in them would be an impracticable coat. I do not wish to say that such a coat could not be made, but that if made it would be so awkward for use that it would be, in my opinion, impracticable for the following reasons:

According to her description the coat had two sets of buttons, both on the same side of the front opening of the coat, the one set being on the rubber side of the garment and the other set being behind the first set and on the inside or cloth side of the garment. On the other hand, according to Mrs. Ward's description, there was but one set of button-holes, and these at the side of the front opening opposite the side of the front opening to which both sets *are* buttons were secured. Hence this one set of button-holes had to be used for both sets of buttons. Mrs. Ward further describes that these button-holes were on the coat. She further describes that there were two
83 fly pieces, both on the same side of the front opening. Consequently, as I understand her description, one of these fly pieces must have been on the rubber side of the coat and must have covered the button-holes on the coat, while the other fly piece must have been on the cloth side of the coat and must have covered over the inner side of the button-holes on the coat. With such a construction, if the garment was put on with the rubber side outside, the fly piece at the cloth side of the coat would have been in the way of buttoning the buttons into the button-holes on the coat, and if the coat should be reversed on the wearer the fly piece of the rubber side of the coat would then have been facing the body of the wearer and would have been in the way of buttoning the buttons into the button-holes on the coat. In fact the button-holes on the coat would have been between two fly pieces, and no buttoning could be done without bending back the fly, which was next the body of the wearer, whether the coat was worn rubber side out or cloth side out.

E. S. RENWICK.

Defendants' counsel offers to produce at the hearing, properly authenticated, a coat made in accordance with Mrs. Ward's description.

Complainant's counsel now gives notice that complainant has no other witnesses present for examination; that complainant claims that its time is indefinitely extended for taking proof by the order of Judge Brown, made on defendants' application on March 7th instant, but that for greater certainty complainant will apply to the

court on next motion day upon papers to be served for relief as to time within which to take additional proofs.

84 Defendants' counsel does not understand Judge Brown's order to have the effect stated by complainant's counsel, and states further that this notice of motion for next motion day is irregular in point of time.

NEW YORK, *March* 19, 1887—11 a. m.

Met pursuant to notice.

Present: W. A. Jenner, Esq., for complainant; G. M. Plympton, Esq., for defendant. William V. Russ attends as a witness for complainant.

WILLIAM V. RUSS, a witness produced on the part of the complainant, having been by me first duly cautioned and sworn in the cause aforesaid to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. William V. Russ. I am going on thirty-one years. I live in Jersey City. I am a rubber dealer at No. 91 Cortlandt street, N. Y., and a member of the firm Russ & Scantlebury.

2 Q. Were you ever employed by the Goodyear India Rubber Glove Manufacturing Company? If yes, when first, and how long did the employment continue?

A. I was first employed by the Goodyear India Rubber Glove Co. in September, 1876, as assistant book-keeper until November 15, 1876, and I was afterward transferred to the wholesale retail department as house salesman.

85 3 Q. And how long did you continue to be salesman for that company?

A. Up to October 1, 1884, to the best of my recollection.

4 Q. Then you went into the employ of that company in September, 1876, as assistant book-keeper, and so remained until November 15, 1876, and continued in their employment as house salesman until you left, in 1884? Is that the way you mean to be understood?

A. Yes, sir.

5 Q. At the time you became salesman, in November, 1876, where was the store of that company?

A. 205 Broadway, N. Y.

6 Q. How long did the company remain there?

A. The company's store at 205 Broadway remained, and the wholesale and extra stock was transferred to 488 Broadway, making another branch of the same concern.

7 Q. When did this transfer occur?

A. About 1878.

8 Q. Where were your duties as salesman performed?

A. At 205 Broadway.

9 Q. From the time you became salesman, in November, 1876, what opportunities did you have for observing the different kinds of clothing which that company had in stock and for sale?

A. At that time I was what we call a junior salesman, kept the

sizes of stock up, and I also made examinations as to imperfections, &c., and was familiar with all styles of clothing made at that time.

10 Q. State whether or not, in the year 1876 or 1877, that company had in stock or on sale coats the tail slit of which was provided with an independent button-hole strip, such as is shown in the exhibit now shown you (Defendants' Exhibit Ferguson No. 1)?

86 A. There was nothing of that kind in stock at that time.

11 Q. Will you state how the slit in the tail of the coats which that company had for sale or in stock in the years 1876 and 1877 compares with the slit in the tail of the coat now shown you?

A. The coats carried in stock in 1876 and 1877 had an eleven-inch opening in the back and was made of simply one piece overlapping the other without any buttons.

12 Q. And does the coat now on your knees illustrate that construction?

A. It does, as it is one of the coats we made at that time and considered their most improved ones.

Coat is offered in evidence, and is marked Complainant's Exhibit Russ Coat No. 1, J. A. R., ex'r.

13 Q. Is the company with which you were connected, as stated by you, the company of which Mr. J. D. Vermeule is president?

A. Yes, sir.

And being cross-examined by Mr. PLYMPTON:

14 X Q. When you speak of keeping the sizes (was that the expression you used?) do you mean by that that you kept the sizes of goods adapted for the different stature of the customers?

A. Yes, sir.

15 X Q. And coats, &c., of different make had the various sizes supplied in common to each, I suppose, did they not?

A. Yes, sir.

16 X Q. And were these various garments made by the

87 Goodyear's Company known by numbers? If not, how did you keep the stock record?

A. They were known by numbers, and each number called for certain size of chest and length measurements.

17 X Q. And in having charge of the stock did you keep your stock ledger, or whatever other book you employed, with these numbers and the other incidents you mentioned?

Objected to, as the witness has not stated that he had charge of the stock.

A. No, sir; there were no books kept. There were blank order sheets given to each salesman to order whatsoever special goods were needed for stock.

18 X Q. And did these blank order sheets when filled in order the goods by numbers and sizes? If not, how?

A. The goods were ordered. If they were regular stock the numbers were given, and if special goods the measurements were sent,

with a drawing of the garment, as near as what was wanted was possible.

19 X Q. To whom or where were these orders sent to be filled?

A. They were sent before the store separated to 164 and 166 Fulton street; afterwards to 488 Broadway, as that was the place where the goods were received from the factory.

20 X Q. State which was the place where the goods were received from the factory.

A. At one time at 164 and 166 Fulton street, and afterwards at 488 Broadway, corner of Broome street.

21 X Q. And you, as salesman in the store No. 205 Broadway, would fill in these blanks, which were in the nature of requisitions, to the stock stores in Fulton street and 488 Broadway in order
88 to fill such orders as you might have at 205 Broadway and to keep the stock in that store up. Is that a correct statement?

Objected to as misleading, containing several questions as assuming the nature of the orders and as assuming the characters of the stores in Fulton street and 488 Broadway.

A. I, as salesman, would order whatsoever goods I needed to fill my sales. Outside of that, I would order what I thought was needed for stock.

22 X Q. And were these orders of yours made on the blanks you have referred to, and were they sent to the Fulton street and 488 Broadway stores?

A. Most of my orders were filled at 488 Broadway, as previous to that there were no order sheets issued while the stores were at 164 and 166 Fulton street, because the extra stock was kept at 164 and 166 Fulton street.

23 X Q. Did you have the management of the store 205 Broadway—*i. e.*, were you the person in charge of that place, or its head?

A. No, sir; I was not.

24 X Q. You are the only salesman there, or was there some one besides you in their employ?

A. There were three besides myself.

25 X Q. And what were the duties of the other three salesmen? Did they correspond with your own?

A. They did.

26 X Q. Each salesman kept up his own line of goods in stock and filled out the orders for that purpose and to complete their sales, I suppose?

Objected to as involving an assumption.

89 A. Each salesman ordered whatsoever goods he needed to complete his sales. I will also add, as I said before, anything that was needed in stock.

27 X Q. Do you know whether any sales were made from the stores No. 488 Broadway and 164 and 166 Fulton street, or were these stores merely stock depositories?

A. The store at 164 and 166 Fulton street was considered the wholesale department and 205 Broadway as wholesale and retail

combined, and when they transferred their wholesale department from 164 and 166 Fulton street to 488 Broadway they established a retail department there as well, making two stores.

28 X Q. By house salesman, which I understood you to say was your position, what is meant?

A. A house salesman is a salesman that contracts no sales outside of the store he is employed in.

And being again examined by Mr. JENNER:

29 R. D. Q. Were the stores 205 Broadway and 164 and 166 Fulton street connected by a passage?

A. They were. There was an archway cut out of the side wall of 166 Fulton street, which made a Broadway entrance to the wholesale department.

WILLIAM V. RUSS.

Subscribed and sworn to before me—
JAMES A. RENWICK,
United States Examiner.

Adjourned to meet Tuesday, March 22, at 2 p. m., at the office of Wetmore & Jenner.

90 NEW YORK, *March* 23, 1887.

Met pursuant to adjournment.

Present: W. A. Jenner, Esq., for complainant; G. M. Plympton, Esq., for defendant.

Charles A. Hodgman attends as a witness for complainant.

CHARLES A. HODGMAN, a witness produced on the part of the complainant, having been first duly cautioned and sworn in the cause aforesaid to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Charles A. Hodgman; forty-three; Tuckahoe, Westchester county, N. Y.; manufacturer of rubber goods.

2 Q. Are you connected with the Hodgman Rubber Company? If yes, state when that company was incorporated, what firm it succeeded, what connection you had with the predecessor firm and what with the present company, and how long the relations mentioned by you have continued.

A. I am connected with that rubber company, which was incorporated December 30th or 31st, 1885; it succeeded the firm of Hodgman & Co., which succeeded the firm of D. Hodgman & Co. I was superintendent of the mills, I cannot say for how long. I am secretary of the present company and have been since it was incorporated.

3 Q. State approximately how long you acted as superintendent of the mills of the predecessor firms.

91 A. About twenty-one years.

4 Q. Was that continuously down to the formation of the present company?

A. With the exception of one year.

5 Q. What year do you except?

A. From May, '72, to May, '73.

6 Q. What were you doing that year?

A. I was in the manufacturing business.

7 Q. Was it manufacturing rubber clothing?

A. No, sir.

8 Q. What has been the business carried on by the Hodgman Rubber Company and its predecessor firms mentioned by you during the period you have been connected with them?

A. Principally rubber clothing.

9 Q. Where has been, during the period of your connection with the company and its predecessors firms, their factory or mills and their warerooms?

A. The factories are at Tuckahoe and at Mt. Vernon, New York, and the warerooms 27 Maiden Lane, New York, and 425 and 459 Broadway.

10 Q. How extensive has been the business in rubber clothing carried on by your company and its predecessor firms as compared with the like business carried on by other concerns, so far as you can form an opinion?

A. We consider ourselves among the largest of the manufacturers of rubber clothing.

11 Q. Were you aware of there being on the market in the year 1876 or prior thereto rubber coats the tail slit of which was provided with an independent button-hole strip such as there is in the Defendants' Exhibit Ferguson No. 1, which I now show you?

A. No, sir.

12 Q. If the Goodyear India Rubber Glove Manufacturing
92 Company had made and sold coats the tail slits of which were provided with an independent button-hole strip such as is shown in that exhibit, and had made them, kept them in stock, and sold them regularly as coats are sold, from 1870 down to year, say, 1877, do you think you would have known of it?

A. I do.

13 Q. Has your company and its predecessor firms regularly dealt in other rubber goods besides those of your own make?

A. Yes, sir.

14 Q. Have you recently made a rubber coat at Mr. Gibbons' request? If so, will you produce it?

Witness produces coat, marked Complainant's Exhibit Hodgman Illustrative Exhibit, March 23, 1887.

This coat just produced was made within the last week or two?

A. Yes, sir.

15 Q. If the instructions which Mr. Gibbons gave you for making this coat were in writing please produce the writing.

Witness produces writing, marked Complainant's Exhibit Description of Hodgman Coat, March 23, 1887.

Defendants' counsel objects to the introduction of the Exhibit

Hodgman Coat and the writing marked Complainant's Exhibit Description of Hodgman Coat as immaterial and without proof that the exhibit coat or the exhibit writing are copies of or made from any description contained in the record of this case.

93 Is the coat produced by you made in accordance with the written instructions produced by you? If there are any differences please state what they are.

A. The only difference is in the button of the slit in tail; the button is a reversible button where it should have been a single button with eyelet.

16 Q. In other respects does the coat conform to the written instructions?

A. Yes, sir.

The coat and the written instructions produced by the witness and already marked are now offered in evidence.

17 Q. What do you say with regard to the merchantability of a coat buttoning as does the exhibit coat produced by you?

A. I would say that it was not merchantable.

18 Q. Why is it not merchantable?

A. Because it could not be buttoned without making a bungling-locking garment.

19 Q. Would a practical maker of rubber coats make such a coat or one buttoning in the manner of the exhibit as a regular article of merchandise?

A. I would not.

20 Q. Do you think any practical manufacturer would?

A. I hardly think so.

Cross-examined by Mr. PLYMPTON:

21 X Q. Was it Mr. Rodman Gibbons, the gentleman now present, who furnished you with the written instructions?

A. Mr. Gibbons furnished it to the company. It did not come direct to me, but to me through our New York office.

94 22 X Q. Personally do you know whether this Exhibit Hodgman Coat is made exactly in accordance with the written instructions with the exception you named, or have you assumed such to be the case?

A. I know it to be the case from examination.

C. A. HODGMAN.

Adjourned to one day's notice.

COMPLAINANT'S EXHIBIT DESCRIPTION OF HODGMAN COAT. March 23d, 1887. J. A. R., Ex'r.

NEW YORK, *March* 17, 1887.

A reversible coat; any size made thus:

(Call rubber side the outside.)

On right front, 6 buttons on the outside and 6 buttons on the inside, back to back, opposite each other, 4″ from edge; on left front,

6 button-holes made in the edge of the body of left front, with a strip down each side of the front and cemented to the front at points between each button-hole.

An 18-inch slit in tail, with button-hole strip, same as in fancy stripe coat, with 2 buttons and holes; but instead of the patch reinforce let the reinforce be made by extending the button-hole strip (or fly) across the V of the opening, say, $\frac{3}{4}$ of an inch.

The above is an impracticable coat. It would not button in front and the cap of the buttons in the tail would show on one side, but this is the way we want the coat made. It is for the purpose of showing its faults.

RODMOND GIBBONS.

Received Mar. 19, 1887.

C. A. HODGMAN.

95 United States Circuit Court, Southern District of New York.

PATENT CLOTHING COMPANY (Limited) }
vs.
GLOVER. }

NEW YORK, *March* 26, 1887.

ROBERT S. WALKER, a witness produced on behalf of the complainant, being duly sworn and examined, testifies as follows:

The said deposition is taken before John H. Ives, a notary public, by consent, in the absence of Mr. Renwick, the examiner.

1 Q. What is your name, age, and residence?

A. Robert S. Walker; 49 years; residence at Flatbush, L. I.

2 Q. What is your present occupation?

A. I am a broker in securities and treasurer and secretary of the Retsof Mining Company, miners and shippers of salt.

3 Q. Were you ever connected with the Goodyear India Rubber Glove Manufacturing Company, of which Mr. J. D. Vermeule is now president? If you were, during what years?

A. I was secretary of that company from the year 1862 to the year 1879, and had charge of the warerooms of the company in this city.

96 4 Q. Whereabouts were those warerooms—the street and number?

A. At 205 Broadway until about 1876. I am not exactly certain as to the exact date. The principal warerooms were moved to the corner of Broadway and Broome street, No. 205 Broadway being kept as a branch store.

5 Q. When the principal warerooms were moved to Broom street and Broadway did you go to Broom street and Broadway or remain at 205 Broadway?

A. I went to Broom street and Broadway.

6 Q. During the time you were connected with that company what acquaintance did you have with the various goods, particularly cloth-

ing, and the construction thereof which that company had in stock or on sale?

A. I had a thorough knowledge of all the goods manufactured or sold by that company.

7 Q. During the time of your connection with that company and prior to the year 1877 did that company have in stock or on sale rubber coats the tail slit of which was provided with an independent button-hole strip, such as is shown in the exhibit now shown you ("Defendants' Exhibit Ferguson No. 1" shown to witness)?

A. They did not.

Cross-examination:

8 X Q. Do you say that the Goodyear India Rubber Glove Company had its principal warehouse for its goods at No. 205 Broadway up to the time of their removal to Broome and Broadway, in 1876?

A. I do, with the connecting stores on Fulton street, in the rear. I mean that to be understood when I say 205 Broadway. I mean those to be included—all one establishment.

97 9 X Q. Was the wareroom 205 Broadway or was it 162 and 164 Fulton street? Which of these two places was the stock wareroom?

A. Both were.

10 X Q. And they communicated by a door through the party wall, or how?

A. The entire party wall was taken out on the first floor, making it substantially one establishment.

11 X Q. And do you remember when that party wall was again bricked up, so that 205 Broadway and the Fulton-street store were two separate stores?

A. Yes; it was done at the time we moved to Broadway and Broome street, about 1876; may have been 1877. I did not charge my memory with it. I can tell by referring to my books.

12 X Q. Now, you have referred to 205 Broadway and its contiguous store as the principal warerooms of the rubber company up to the time of their removal, in 1876 or thereabouts?

A. I think you misunderstood me a little. I spoke of 205 Broadway as the warerooms of the company until they moved uptown, and then they had two warerooms.

13 X Q. Now, was No. 205 Broadway and the contiguous Fulton-street store the only warerooms the rubber company had in this city up to the time of their removal?

A. Yes.

14 X Q. And during your connection with the company were these two places the only warerooms that the rubber company had in this city or elsewhere? By warerooms I mean places where manufactured stock was stored until called for in the course of trade.

A. They were the only ones in this city, but for a year or two the company had a branch store in St. Louis, Mo.

98 15 X Q. And were the two New York stores you have named before removal and the St. Louis branch store the

6 button-holes made in the edge of the body of left front, with a strip down each side of the front and cemented to the front at points between each button-hole.

An 18-inch slit in tail, with button-hole strip, same as in fancy stripe coat, with 2 buttons and holes; but instead of the patch reinforce let the reinforce be made by extending the button-hole strip (or fly) across the V of the opening, say, ¾ of an inch.

The above is an impracticable coat. It would not button in front and the cap of the buttons in the tail would show on one side, but this is the way we want the coat made. It is for the purpose of showing its faults.

RODMOND GIBBONS.

Received Mar. 19, 1887.

C. A. HODGMAN.

95 United States Circuit Court, Southern District of New York.

PATENT CLOTHING COMPANY (Limited) }
vs. }
GLOVER. }

NEW YORK, *March* 26, 1887.

ROBERT S. WALKER, a witness produced on behalf of the complainant, being duly sworn and examined, testifies as follows:

The said deposition is taken before John H. Ives, a notary public, by consent, in the absence of Mr. Renwick, the examiner.

1 Q. What is your name, age, and residence?

A. Robert S. Walker; 49 years; residence at Flatbush, L. I.

2 Q. What is your present occupation?

A. I am a broker in securities and treasurer and secretary of the Retsof Mining Company, miners and shippers of salt.

3 Q. Were you ever connected with the Goodyear India Rubber Glove Manufacturing Company, of which Mr. J. D. Vermeule is now president? If you were, during what years?

A. I was secretary of that company from the year 1862 to the year 1879, and had charge of the warerooms of the company in this city.

96 4 Q. Whereabouts were those warerooms—the street and number?

A. At 205 Broadway until about 1876. I am not exactly certain as to the exact date. The principal warerooms were moved to the corner of Broadway and Broome street, No. 205 Broadway being kept as a branch store.

5 Q. When the principal warerooms were moved to Broom street and Broadway did you go to Broom street and Broadway or remain at 205 Broadway?

A. I went to Broom street and Broadway.

6 Q. During the time you were connected with that company what acquaintance did you have with the various goods, particularly cloth-

ing, and the construction thereof which that company had in stock or on sale?

A. I had a thorough knowledge of all the goods manufactured or sold by that company.

7 Q. During the time of your connection with that company and prior to the year 1877 did that company have in stock or on sale rubber coats the tail slit of which was provided with an independent button-hole strip, such as is shown in the exhibit now shown you ("Defendants' Exhibit Ferguson No. 1" shown to witness)?

A. They did not.

Cross-examination:

8 X Q. Do you say that the Goodyear India Rubber Glove Company had its principal warehouse for its goods at No. 205 Broadway up to the time of their removal to Broome and Broadway, in 1876?

A. I do, with the connecting stores on Fulton street, in the rear. I mean that to be understood when I say 205 Broadway. I mean those to be included—all one establishment.

97 9 X Q. Was the wareroom 205 Broadway or was it 162 and 164 Fulton street? Which of these two places was the stock wareroom?

A. Both were.

10 X Q. And they communicated by a door through the party wall, or how?

A. The entire party wall was taken out on the first floor, making it substantially one establishment.

11 X Q. And do you remember when that party wall was again bricked up, so that 205 Broadway and the Fulton-street store were two separate stores?

A. Yes; it was done at the time we moved to Broadway and Broome street, about 1876; may have been 1877. I did not charge my memory with it. I can tell by referring to my books.

12 X Q. Now, you have referred to 205 Broadway and its contiguous store as the principal warerooms of the rubber company up to the time of their removal, in 1876 or thereabouts?

A. I think you misunderstood me a little. I spoke of 205 Broadway as the warerooms of the company until they moved uptown, and then they had two warerooms.

13 X Q. Now, was No. 205 Broadway and the contiguous Fulton-street store the only warerooms the rubber company had in this city up to the time of their removal?

A. Yes.

14 X Q. And during your connection with the company were these two places the only warerooms that the rubber company had in this city or elsewhere? By warerooms I mean places where manufactured stock was stored until called for in the course of trade.

A. They were the only ones in this city, but for a year or two the company had a branch store in St. Louis, Mo.

98 15 X Q. And were the two New York stores you have named before removal and the St. Louis branch store the

only places during your connection with the company where they kept a stock of manufactured goods?

A. They consigned goods at different times during my connection with the company to parties doing business in other cities, who acted in the capacity as agents for the sale of the company's goods, but who transacted their business entirely in their own name.

16 X Q. Were these consignees in the principal cities of the United States, north, east, south, and west?

A. No.

17 X Q. State, if you now remember, where they were.

A. In Boston and Chicago; at present I think of no other.

18 X Q. Can you say positively that you have named all the cities where these consignees were situated in naming these two?

A. These were the principal accounts. There may have been one or two others, but they were small and unimportant, if any. I would add San Francisco; it just occurs to me.

19 X Q. Can you recall any other city in which the company had a consignee for their goods?

A. I cannot.

20 X Q. Can you say now that you have named all the cities in which they had consignees?

A. All of any importance.

21 X Q. Will you name the unimportant ones?

A. I have already stated that I could not remember any others.

22 X Q. As secretary of the rubber company I suppose it was part of your duty to correspond with these consignees of the company, was it not?

A. It was.

99 23 X Q. And you did so correspond during your connection with the company, did you not?

A. I did.

24 X Q. And such correspondence was your special duty, I suppose, not necessarily exclusive?

A. It was a part of my duties. I was made secretary of the company simply to give me an official position. I was principally occupied in taking general charge of the goods, in selling them, looking after the clerks and salesmen and having a general oversight of the business of the company at the depot in this city.

25 X Q. When the goods were forwarded to the Boston, Chicago, and San Francisco depots, and to the various consignees in other places, I suppose they were always forwarded from the New York house and never directly from the factory. Am I correct in this supposition?

Objected to as assuming "other consignees."

A. That was the invariable rule. If there were any exceptions they were very few.

26 X Q. Do you know of your own knowledge or can you now recollect whether that invariable rule was departed from in any instance?

A. I cannot remember a single instance.

27 X Q. Can you say that that invariable rule was never departed from?

A. I can only repeat my former replies.

28 X Q. Do you say now, being mindful of your oath, that the invariable rule you have stated was never departed from?

A. No; I do not. I should not be willing to say now, after a lapse of eight years since my connection with the company ceased, that during the seventeen years during which I was con-
100 nected with the company that no goods had ever been shipped from our factory in Naugatuck except through the New York depot, but it was the rule that all goods should go through the New York warerooms, as I have before stated, and this rule was carefully lived up to.

30 X Q. Your connection with the company commenced in 1862 and continued until 1879. Were you secretary of the company during that entire period?

A. I was secretary until February, 1879. February, I think, was the month, and my connection with the company ceased on the 30th day of April that year.

31 X Q. Can you now, after a lapse of more than twenty-three years since your first connection with the rubber company, describe with particularity as to details of construction the different kinds of garments that this company made during the seventeen years during which you were connected with it? If yes, please do so.

A. Yes; I think I can. During the first few years we manufactured our clothing by two processes—one called solarized because they were dried by the heat of the sun; another by the acid process, and which we called C goods. Subsequently, when the Goodyear's patents expired about 1866 or 1867, we made them under the Goodyear process, which is called vulcanized. We made all the different styles of garments called for by the trade at those different times. That is all, I think.

32 X Q. Have you now in your last answer, to the best of your present recollection, given me the facts asked for in the last preceding question?

A. I have merely stated in a general way what the business of the company was. Should be pleased to give any particulars in my power you may ask for.

101 33 X Q. Then oblige me by giving a detailed answer to the 31st X question, which the magistrate will again read to you.

Objected to as immaterial and unnecessary for any purpose.

A. Well, the principal styles of coats we manufactured were called sacks, officers' coats, talmas, capes, capes with sleeves, ponchos, leggings, army blankets. The sacks were short, reaching above the knee, were made double-breasted and of four sizes, Nos. 3, 4, 5, and 6. The officers' coats were made in similar style and sizes to the sacks, but from four to six inches longer; originally they were made without any opening in the tail at the back, but subsequently a slit of from six to eight inches was made in the tail. Talmas were made

without sleeves, but with armholes and a cape extending from each shoulder to the center of the breast, covering each armhole.

The capes were also called cloaks and were made single-breasted, some with and some without sleeves.

Ponchos were made originally for the export trade and were a blanket, the usual size being 60 by 72 inches, with a hole in the middle, with a collar and neck piece fitted to it. These were also made of larger sizes.

The leggings were made of two kinds, known as walking and riding leggings, the former reaching about to the knees and the latter four to six inches higher up. They were secured by a strap around the waist of the wearer, to which short straps were attached reaching to the leggings.

The army blankets were made the standard size, 45 x 72 inches, with eyelets at suitable distances around the edges, so that they could be lashed together and made into tents by the soldiers
102 in the field. Some of them were made with a slit in the middle, running crossways, so that *that* they might be used by the soldier as a poncho, and were, therefore, called poncho blankets. These different styles of clothing were made of different material and of different qualities. The commonest quality and the one most sold and used was known as "lustre," the name arising from the shiny finish of the goods. The next quality was known as dull-finish goods, also on account of the finish. The goods were made in plain muslin, plain drillings, alpacas, serges, cambrics, silk, ginghams, and a few on some woolen goods—a very few. They were also made of different colors—white, blue, tan color, and black, the black being the color which was sold most largely and the white next. We also manufactured coats and capes and leggings for boys having the same general characteristics. About 1874 or 1875 we took up the manufacture of what is known in the trade as gossamer goods and made a line of ladies' garments. We named our goods "zephyrs," and made a large number of them. These were made in several styles and of a number of sizes. We also made a line of men's garments out of these zephyr goods, the patterns being substantially the same as those made of rubber. We made also a full line of gloves of all styles both for ladies and gentlemen; also rubber caps and hats of various styles. This is my answer.

34 X Q. Have you now, to the best of your present recollection, answered as fully as you can the 31st cross-question? If not, you may add to your previous answer anything else that occurs to you.

A. We also made coats called "ulsters," which were longer and larger than the officers' coats, with a belt around the waist. All of our cheaper qualities of sacks and officers' coats had two outside
103 pockets, one on either side on the hips, with a suitable flap; the officers' coats, except of the cheapest lustre quality, had a tag buttoned across the throat when the collar was turned up; the cheaper qualities of lustre, officers did not have this. I cannot think of any other details at this moment.

35 X Q. Going back to the store No. 205 Broadway, as a rule, were

not the goods that were kept in that store such as were adapted to the local retail trade?

A. Yes; after the principal warerooms were removed to Broadway and Broome street.

36 X Q. As a rule, was not the principal trade transacted at 205 Broadway a retail trade?

A. Yes; after the principal warerooms had been removed to Broadway and Broome street, but considerable export trade was also done there.

37 X Q. Is it not a fact, Mr. Walker, in your recollection, that the mail orders went directly to the upper store and not to 205 Broadway?

A. Yes, it is; because the company had a post-office box and the letters were always got by a clerk from the upper office.

38 X Q. Is it not true within your recollection that a large proportion of the wholesale orders filled at 205 Broadway were orders transmitted from the upper store?

A. No; it is not.

39 X Q. Can you say it was not usual for you to have wholesale orders sent from the upper store to 205 Broadway?

A. It was customary when we received orders for any goods that were not in stock at Broadway and Broom street to send to the lower store for any they might have in stock there and to use them in filling such orders, but it was not customary to have the goods shipped from the lower store unless the orders for them came through that store, and not always then.

104 40 X Q. Will you, if you please, state whether, in addition to the stock usually kept in store, which I may call staple goods, your company during your connection was at times called upon to make special lines of goods, or, if you please, fill sample orders having special construction?

A. They were repeatedly.

41 X Q. And what did you call that class of orders?

A. They were simply called special orders; no general name for them.

Redirect examination:

42 R. D. Q. Did the glove company spoken of also make rubber bottles, life-preservers, and air cushions?

A. Yes.

43 R. D. Q. Did that company ever make coats identically like the exhibit now shown you—fabric, lining, rubber surface, buttons, details of construction considered? (Complainant's Exhibit Russ Coat No. 1 shown to witness.)

A. They did.

44 R. D. Q. Did they make such coats and sell them in the year 1878 or 1879?

A. They did.

45 R. D. Q. Is there any special event which enables you to so state positively?

A. I purchased for my own use a coat similar in all respects to the one now shown me when I was leaving the company in 1879.

46 R. D. Q. Have you that coat with you now?

A. I have.

47 R. D. Q. Will you please produce it and state how long that has been in your possession?

Objected to as immaterial.

105 A. Here is the coat. It has been in my possession since April, 1879, to the present time.

48 R. D. Q. Is your coat now in good condition for wear?

Same objection.

A. It is.

49 R. D. Q. I do not wish to deprive you of your coat, but will ask you to compare your coat with the "Complainant's Exhibit Russ Coat No. 1" and state whether there are any differences between your coat and the exhibit coat, either in fabric, rubber surface, lining, color, style, shape, details of construction, mode of forming the fly opening in front, mode of forming the tail slit, buttons, or in any other respect? Include also the hang-up loop. State all the differences that there are.

Same objection.

A. My coat is an exact duplicate in every respect of the coat shown me.

50 R. D. Q. Would you say that they were made as part of the same lot?

A. They are near enough alike in every respect to have been cut from the same piece of goods and made at the same time.

Defendant's counsel is invited to examine the witness's coat for the purposes of cross-examination.

ROBERT S. WALKER.

Attest: JOHN H. IVES.

106 NEW YORK, *April 2d*, 1887.

Met pursuant to adjournment.

Present: Wm. A. Jenner, Esq., for complainant; Gilbert M. Plympton, Esq., for defendant.

JOHN W. KEELER, a witness for complainant, having been duly sworn, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. John W. Keeler; forty years old; 229 East 111th street, New York city; I am a printer.

2 Q. Are you now a member of any firm?

A. I am in business for myself, if you call that a firm.

3 Q. Did you succeed in business any firm; if so, what was the predecessor firm name?

A. I did; Perris & Browne.

4 Q. When did you succeed to the business of that firm?

A. In 1883.

5 Q. Where did that firm do business at that time?

A. At 164 Fulton street, New York city.

6 Q. Did that firm turn over to you their fixtures?

A. They turned over to me all that pertained to their printing business.

7 Q. Among the things turned over to you was there a book of samples—one or more such books?

A. There was.

8 Q. Were you in the employ of Perris & Browne prior to your succeeding to the business?

A. I was for nearly twenty consecutive years.

9 Q. And were those years immediately prior to your succeeding to the business?

A. They were.

107 10 Q. Among the sample books turned over to you when you succeeded to the business was there any book containing samples of catalogues appearing to have been printed for the Goodyear India Rubber Glove Company, including the years 1873 to 1877, inclusive?

A. There was.

11 Q. Have you that book present, and will you produce it?

A. I have and will.

Witness produces the book marked for identification on the back "Sundries 2, P. & B."

12 Q. Has this book been in your possession from the time that you succeeded to the firm of Perris & Browne to the present time?

A. It has, to the best of my knowledge and belief.

13 Q. Is the book now in the same condition, as to the printed samples therein, that it was at the time of your succession?

A. It is.

14 Q. We may wish to take therefrom for exhibition to the court certain catalogues of the Goodyear India Rubber Glove Company. Have you any objection to our doing so?

A. I have none.

15 Q. We will ask you, then, to leave the book with the examiner for the examination of other witnesses, and the examiner will then return it to you. Will that be agreeable to you?

A. It will.

Cross-examined by Mr. PLYMPTON:

16 X Q. Do you know whether the firm of Perris & Browne, during the time referred to in the tenth direct question, were
108 the sole or exclusive printers, or whether they did all of the printing of the Goodyear India Rubber Glove Manufacturing Company?

A. I do not. We did a great deal of it.

17 X Q. Do you know whether the sample catalogues referred to by you as being in this book marked "Sundries 2, P. & B," were the

only catalogues issued by the rubber company referred to at the time or times mentioned in the tenth direct question?

A. I do not.

JOHN W. KEELER.

WILLIAM G. PERRIS, a witness on the part of the complainant, deposes and says as follows:

The administering of the oath to the witness is waived by both sides in the absence of the commissioner.

1 Q. What is your name, age, residence, and occupation?

A. William G. Perris; fifty-one years old; 144 East 128th street, Harlem. I am a map publisher.

2 Q. Are you a member of any firm, and of what firm?

A. The firm of Perris & Browne.

3 Q. Does that firm now carry on the business of map publishing?

A. Yes.

4 Q. Did that firm ever carry on the business of job printing?

A. Yes, sir.

5 Q. When did it cease doing that business and who succeeded to the business?

A. In April, 1883. John W. Keeler succeeded.

6 Q. How long did that firm carry on the business of job printing prior to 1883?

109 A. Twenty years.

7 Q. Whereabouts did that firm do that business at the time of their succession?

A. 164 Fulton street.

8 Q. Did your firm do any printing for the Goodyear India Rubber Glove Manufacturing Company from the years 1870 down to 1879?

A. Yes, sir.

9 Q. I show you a book of samples marked "Sundries 2, P. & B." Do you recognize this book? If you do, by whom was it kept and for what purpose?

A. I recognize the book. It was in our possession and was kept by myself and partner, Mr. Browne, for the keeping of samples of work done by us.

10 Q. Who pasted the samples in the book?

A. They were pasted in by myself and partner.

11 Q. When were the samples pasted in the book with reference to the time when the printing was done?

A. Well, it might have been immediately afterward and it might have been six months afterward. We waited until the samples accumulated and then we pasted them in.

12 Q. When Mr. Keeler succeeded to your job-printing business was this book turned over to him as part of the effects?

A. Yes, sir; all the sample books were.

13 Q. What period is covered by this sample book?

A. I think from October, '71, to March, '78, as near as I can get

at it without going back each way some distance, as they may not be entirely put in according to dates.

14 Q. Is the period that you have named approximately correct?

A. Yes.

110 15 Q. Have you this morning, before coming into court, examined this sample book for the purpose of finding therein samples of catalogues or lists printed by your firm for the Goodyear India Rubber Glove Co.?

A. I have.

16 Q. Will you please point out the first catalogue or list relating wholly or partly to rubber clothing which you find in the book printed for that company?

The witness points to one dated December 1st, 1875, which is put in evidence, marked Complainant's Exhibit Goodyear Catalogue No. 1, consisting of one sheet.

Will you please detach from the book the catalogue referred to?

A. I have done so.

17 Q. When was this catalogue marked Complainant's Exhibit Goodyear Catalogue No. 1 printed?

A. December 9th, 1875.

18 Q. And were a quantity of catalogues or lists furnished to the said Goodyear Company like the exhibit in or about December, 1875?

A. Yes, sir; either on the 9th or the 10th; they were sent in as soon as printed, as a rule.

19 Q. Will you turn to the next catalogue or list of rubber clothing printed by your firm for the Goodyear Company, and please also detach that from the book?

The witness does so, and produces a paper, marked Complainant's Exhibit Goodyear Catalogue No. 2.

20 Q. When was this Exhibit Catalogue No. 2 printed?

A. October 4, 1876.

21 Q. And at or about that time were others like it furnished to the said Goodyear Company?

111 A. Yes; this is a sample out of the lot.

22 Q. Please turn to the next catalogue or list in the book printed for the Goodyear Company and relating wholly or partly to rubber clothing and detach it in like manner.

The witness does so, and produces a paper, marked Complainant's Exhibit Goodyear Catalogue No. 3.

23 Q. When was this Exhibit Catalogue No. 3 printed?

A. March 13, 1877.

24 Q. And were other catalogues like this sent to the said Goodyear Company in or about March, 1877?

A. Yes, sir; that is one taken out of the lot printed at that time.

25 Q. Please turn and detach the next catalogue or list relating wholly or in part to rubber clothing which you find in the book.

Witness does so, and produces a paper, marked Complainant's Exhibit Goodyear Catalogue No. 4.

26 Q. When was this Exhibit Catalogue No. 4 printed by your firm?

A. November 19, 1877.

27 Q. And at or about that time were other catalogues or lists furnished to the said Goodyear Company like the exhibit?

A. Yes, sir; it was one of a lot.

28 Q. These four catalogues or lists produced by you, how were they attached or fastened in the book?

A. They were pasted in on the corner of the lists.

29 Q. The book itself was a scrap book?

112 A. Yes; I suppose so. I should call it a sample book.

30 Q. I mean it was made up of blank sheets of brown paper for the purpose of having other pieces of paper pasted to the blank pages and then bound up as a scrap book, usually.

A. Well, it was really made for a sample book.

The four catalogues or lists marked Complainant's Exhibits Goodyear Catalogues No. 1 to No. 4, both inclusive, are offered in evidence.

The introduction of these lists is objected to by defendants' counsel as immaterial.

Cross-examined by Mr. PLYMPTON:

31 X Q. Prior to December 9th, 1875, which you say is the date on or at which the catalogue Exhibit 1 was printed by your firm, do you know who printed the catalogues for the Goodyear India Rubber Glove Manufacturing Company?

A. I think we printed some previous to that.

32 X Q. Where are the samples now of such prior lists?

A. I don't know. I don't really know that we printed any, but I think it likely. We did work for the rubber company since 1868.

33 X Q. If you printed any lists of clothing for the rubber company prior to December 9th, 1875, you would be likely to preserve samples of such lists pasted in sample books like the one referred to as No. 2, would you not?

A. I would. We were supposed to keep samples of all our work back to 1863, though I don't think the books are in existence as far back as that.

113 35 X Q. Please look at the Book No. 2, from which you detached the samples from 1 to 4, inclusive, and which you said you thought included samples of printing from the shop of Perris & Browne from 1871, and state whether you can find in the Book No. 2 any samples of clothing lists of the Goodyears India Rubber Glove Manufacturing Company prior to December 9, 1875.

A. I have looked through, but have not found any.

36 X Q. If your firm of Perris & Browne printed any such clothing sample lists prior to December 9, 1875, they ought to appear in the book Sundries No. 2, unless through carelessness or oversight they were omitted, should they not?

A. I believe they should. There might be a list in some other book, though I don't think there is.

37 X Q. Then so far as the book Sundries No. 2 is concerned, from which you detached the samples, Exhibits 1 to 4, inclusive, it apparently is incomplete in the particulars inquired about, is it not?

Objected to as misstating the evidence of the witness and drawing unjustifiable conclusions therefrom.

A. I think not; no more incomplete than most books of samples that are kept carefully.

38 X Q. But the fact remains and your inspection of the book Sundries No. 2 discloses that that book does not contain any samples of the clothing lists of the Goodyears India Rubber Glove Manufacturing Company prior to December 9, 1875, does it not?

Objected to as arguing and assuming that said company had clothing lists prior to the date mentioned.

114 A. Yes, sir; or they might have had numbers of lists printed outside, so far as I know.

39 X Q. Or it might be, as you intimated in one of your previous answers, that some of the clothing lists of the Goodyear's India Rubber Glove Manufacturing Company might have been omitted from the book Sundries No. 2 and placed in some other book of job samples of Perris & Browne, might it not?

Objected to, as such intimation has not been given.

A. It might, but I think not, as this book Sundries No. 2 was used as a book of reference, referring to the dates when work was done. We generally put a copy of the first edition printed of these lists in the book with the date on.

40 X Q. There seems, from the pencil dates on the Exhibits 1 to 4, inclusive, that in '75 and '76 you printed but one job of clothing lists in each of those years, and that in 1877 you printed two jobs of such lists. Can you say now that the exhibits you produce are samples of all the clothing lists you printed for the rubber company in the years indicated in the question?

A. No, sir; there might have been eight or ten lots of those lists printed.

41 X Q. And can you say now, Mr. Perris, that each of the several lots were precisely the same as are the four exhibits referred to, or might it not have been that some minor changes, such as the addition of a name or a price, or possibly a line of goods might have been added, omitted, or changed, and that the change being of such a character would not necessarily call for the preservation in your sample book of such alteration, addition, or changes?

115 A. The lots are not precisely the same, as prices change on various lists, of course.

42 X Q. Cross-question No. 41 repeated.

A. Yes; that might have been.

43 X Q. It seems from the notice printed on all of the Exhibits 1 to 4, inclusive, that the Goodyear India Rubber Glove Manufacturing Company was established in 1844. When did I understand

you to say Perris & Browne commenced to print for them and when they ceased so doing?

A. They commenced to print for them, I think, in 1868 and continued up to 1880, I think. I am not positive about these dates.

44 X Q. Do you know, Mr. Perris, where the other sample books of Perris & Browne now are—I mean all of their sample books excepting the one before us, Sundries No. 2?

A. They were left in the possession of our successor, John W. Keeler, at 164 Fulton street, New York, and I have not since had any control of them.

Redirect:

45 Q. This book is Sundries No. 2. Were other sample books kept contemporaneously with this one?

A. Yes, sir; quite a number. There were six altogether.

46 Q. What kinds of samples were put in the other books?

A. We had a book for bill-heads, another for note and letter heads, another for business cards, another for address and fancy cards, and a large book for large work—posters and hangers.

47 Q. Samples such as the lists produced would regularly be placed in the sundries book, would they not?

116 A. They would, unless too large for the book.

48 Q. Have you any remembrance of printing, during the period covered by your evidence, any clothing list for the Goodyear's India Rubber Manufacturing Company too large to be pasted in the sundries book?

A. I have no recollection. I believe not.

49 Q. Have you any reason to suppose that the book, Sundries No. 2, does not contain samples of all the lists printed by you for that company during the period embraced by the book?

A. I have not.

50 Q. Do you find in the book any lists other than those produced by — and put in evidence, irrespective of their referring to clothing? I, of course, mean lists of the India Rubber Glove Manufacturing Company.

A. Yes, I find several others.

51 Q. Do you find any earlier than 1875?

A. I find one 1873.

52 Q. What does that list refer to?

A. I think they call it toy list.

53 Q. And the next list, what is its date?

A. August 1, 1873.

54 Q. What does it refer to?

A. Combs—rubber combs.

55 Q. The next list, what is its date and what classes of goods are embraced in it?

A. August 1, 1873; druggists' articles.

56 Q. Are the pages of this book, Sundries No. 2, paged?

A. No, sir.

57 Q. About how many pages would you say that the book contained, as an estimate?

A. Probably a thousand.

58 Q. Are each of the pages filled?

A. Pretty well filled.

117 Recross:

59 X Q. In looking through the book, Sundries No. 2, referred to in your examination, I find that it is miscellaneous specimens of job printing; is that correct?

A. That's correct; the name of the book shows that.

WILLIAM G. PERRIS.

Adjourned to Monday, April 4, at 2.30 p. m.

NEW YORK, *April* 4, 1887.

Met pursuant to adjournment.

Present: Wm. A. Jenner, Esq., for complainant; Gilbert M. Plympton, Esq., for defendant.

WILLIAM V. RUSS, recalled, deposes and says as follows:

1 Q. Have you heretofore made a deposition in this suit?

A. I have.

2 Q. I show you Complainant's Exhibits Goodyear's Catalogues Nos. 1 to 4, inclusive. State, if you know, what they are.

A. The No. 1 is the list of the zephyr goods, including ladies' and gents' garments; Exhibit No. 2, dated October 1st, 1876, is a list of the same character; Exhibit No. 3, dated March 1st, 1877, is a list of the same character as the others; Exhibit No. 4, dated November 15, 1877, is the boot and shoe list.

3 Q. They refer to goods of whose manufacture?

A. The Goodyear's India Rubber Glove Manufacturing Company.

118 4 Q. In Nos. 1 and 2 there are set down under the heading of "gentlemen's zephyr coats" the following: Sack coats, long talmas, and ulsters. State how the coats so mentioned or described compared with the gentlemen's sack coat, talma, and ulster illustrated in No. 3?

A. The gentleman's sack coat long, the length of which was about six inches below the knees, having two lines of buttons down the front and an opening at the back about eleven inches long. The opening at the back was made with simply one piece overlapping the other. The gentleman's zephyr talma was a coat of the same length, having a cape reaching to about three inches below the waist, having a slit in the back same as the sack coat long. Gentleman's zephyr ulster was a coat made the same as the sack coat long and same length as the sack coat long, having a belt to go around the waist, and had an opening in the back the same length, and made the same as the other coats.

5 Q. Does your description contained in the last answer apply to the sack coat, talma, and ulster mentioned in the three catalogue exhibits?

A. It does.

6 Q. Was the Catalogue Exhibit No. 1 in force when you went into the employment of the Goodyear Rubber Company?

A. It was.

7 Q. When was the catalogue No. 2 issued?

A. In October, 1876.

8 Q. When was the catalogue No. 3 issued?

A. March 1st, 1877.

9 Q. Did any of the coats mentioned in either of the three catalogues have any independent button-hole strip either in front or in the tail?

A. They did not.

119 10 Q. What is this list now shown you?

A. That is what we call a general clothing list.

11 Q. Of whose goods?

A. The Goodyear's I. R. Glove M'f'g Co.

12 Q. Of clothing manufactured by that company?

A. Yes.

13 Q. When was that list published?

A. In the years of 1877 or 1878.

14 Q. How do you fix that date?

A. Because they moved to 488 Broadway in the spring of 1877, and I think this list was published the following year.

15 Q. Do you find on the cover of this list the address 488 Broadway?

A. I do.

List offered in evidence and marked Complainant's Exhibit Goodyear Catalogue No. 5.

Objected to as immaterial.

16 Q. In your former deposition you stated the removal of that company to Broadway and Broome street to have been "about 1878;" you now state it to have been in the spring of 1877. Please explain how the discrepancy occurred.

A. In thinking it over, I went with them in 1876, and I think they moved in the following year, to the best of my knowledge.

17 Q. I have myself paged the Exhibit Goodyear Catalogue No. 5 at the top of each page. I call your attention to page 10 of the catalogue and the article "London coats," under the heading "extra fine clothing." How did the London coat there referred to compare with Complainant's Exhibit Russ Coat No. 1?

120 A. The coat marked Russ Coat Exhibit No. 1 is the same coat.

18 Q. I call to your attention the reversible coats under the same heading and on the same page. Did any of the reversible coats, while you were with the company, have any independent button-hole strip either in front or in the tail?

A. They did not.

19 Q. Look at the coats illustrated on page 3 of the catalogue No. 5. Did any of these coats have an independent button-hole strip either in front or in the tail?

A. They did not.

20 Q. And how, with respect to the coats mentioned on pages 4, 6, and 8 of catalogue No. 5—did any of those have an independent button-hole strip either in the front or in the tail?

A. They did not.

Cross-examined by Mr. PLYMPTON:

21 X Q. Did you furnish for this examination the book marked Complainant's Exhibit Goodyear's Catalogue No. 5?

A. I decline to answer.

22 X Q. Why do you decline?

A. Because I think the question is unnecessary.

23 X Q. Did you ever see this particular book, Goodyear's Catalogue No. 5, before this afternoon?

A. Yes, sir.

24 X Q. How long have you known this particular book?

A. I guess I've known it about five years.

25 X Q. And has this particular book been in your possession during that time?

A. It has.

121 26 X Q. And did you give it to Mr. Gibbons or his counsel?

A. I gave it to Mr. Gibbons.

27 X Q. When?

A. Quite some time ago.

28 X Q. About how long ago? Since the time when you last appeared as a witness?

A. I think so.

29 X Q. And is this book, Catalogue Exhibit 5, in the same condition now that it was when you gave it to Mr. Gibbons?

A. It is.

30 X Q. And before giving it to Mr. Gibbons the mutilation that now appears on the 14th page of that book, under the head of zephyr and Derby waterproof goods, was in the same state that it is now in?

A. Yes, sir.

31 X Q. And did you mutilate that page?

A. I did.

32 X Q. And before the book had been shown to Mr. Gibbons or his counsel?

A. Yes; I cut that piece out of that page over two years before I ever gave it to Mr. Gibbons.

33 X Q. Have you a duplicate of this book, Goodyear's Catalogue No. 5, or can you get one?

A. No, sir.

34 X Q. Can you now supply from your memory the matter that has been cut from the 14th page? If yes, please do so.

A. Yes, sir; the print on the side of page 14 are the list prices of gentlemen's zephyr coats, talmas, ulsters, leggins, hats, and caps; that's all.

35 X Q. Is that the best you can do towards supplying the matter cut out of the 14th page?

A. Yes, sir.

122 36 X Q. Was Mr. Walker, the former secretary of the Goodyear's I. R. Glove M'f'g Co., dropped from the company by the vote of the company while you were employed by it?

Objected to, as it has not appeared that Mr. Walker was dropped by the vote of the company, and, if he was, the written resolution or minute book is the best evidence of it.

Defendant's counsel gives notice that he will produce the resolution or minute book at the hearing, showing the vote dropping Mr. Walker by the company.

Complainant's counsel objects to the notice and will also object to the production of the book.

A. He was.

37 X Q. The question which I now put to you you may decline to answer if true and you may deny it if untrue. Were you discharged from Goodyear's India Rubber Glove Manufacturing Company on the 1st of October, 1884, because of a dishonest transaction on your part, and did you at the said time of your discharge confess the dishonesty and refund to the company the sum of $150?

Objected to as improper in form.

A. I decline to answer.

38 X Q. The question that I now put to you you may decline to answer, if true and you have the knowledge; if untrue, deny it. Was your present partner, Mr. Scantlebury, discharged by
123 Goodyear's I. R. Glove M'f'g Co. on the 1st of October, 1884, because of dishonesty, and did he then refund to the company, confessing his dishonesty, the sum of two hundred dollars?

Same objection.

A. The same answer.

39 X Q. Does the Goodyear's I. R. Glove M'f'g Co. refuse now to sell the firm of Russ & Scantlebury goods?

A. They do not, as our dealings with them have been cash, discounting the bills.

40 X Q. And for the reason stated by you, do they now sell you goods?

Objected to for incompetency.

A. Yes, sir; they do.

41 X Q. Have you any credit with the Goodyear I. R. Glove M'f'g Co.?

A. No; we don't want it, as the firm I represent does not wish to be under any obligations to it. Our credit through the city stands to-day A1 with any other house in the rubber business, in the city of New York and elsewhere.

Redirect:

42 Q. The mutilation about which you were cross-examined as respects page 14 also includes page 13, which is a part of the same

leaf. What was on page 13 where the part appears to have been cut out?

A. The upper part of page 13 has a cut of a horse with a horse-cover on running from the shoulders to the tail; the lower part, cut out of page 13, had on a horse with a horse-cover on running from the ears to the tail. The idea was in the two cuts to show the difference between a horse-cover without a hood and a horse-cover with a hood.

124 43 Q. Can you explain how the mutilation occurred?

A. It occurred this way: I wanted that wood cut to send away with a letter.

WILLIAM V. RUSS.

Adjourned to Wednesday afternoon, April 6, at 2.30 p. m.

NEW YORK, *April 6th*, 1887.

Met pursuant to adjournment.

Present: Causten Browne, Esq., for complainant; Gilbert M. Plympton, Esq., for defendant.

SOLOMON GOLDSMITH, a witness produced on the part of the complainant, having been duly sworn by John A. Shields, Esq., deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Solomon Goldsmith; fifty-two years old; New York city. I am a merchant.

2 Q. Are you interested in the Patent Clothing Company, plaintiff in this case?

A. I am.

3 Q. Are you an officer of it?

A. No, sir.

4 Q. Did you formerly live and do business in California? If so, please state from what time to what time, as nearly as you can remember.

A. I lived in California from 1853 till 1858, and lived there again from 1867 till 1884. I was engaged in business there from 1867 till 1887.

5 Q. In what business?

A. Wholesale dealer in clothing and furnishing goods.

6 Q. Did you, during those years, deal in overalls?

125 A. I did.

7 Q. Were you, while in California, acquainted with that sort of overalls in which the sides of the fly opening where they come together were fastened by a rivet or rivets to prevent accidental ripping?

A. I was.

8 Q. Was this kind of overall in good demand among miners and others?

A. We had a great many calls for them.

9 Q. If there was any objection to the use of metal rivets for

a fastening to prevent ripping at the fly crotch, will you state what it was?

A. The objections were these: Persons who wore them claimed that they could not well be washed, as the metal sometimes rusts; also that the material around the metal would wear out. Some people objected to wearing them, as they did not look neat.

10 Q. Did you suggest to any one the desirableness of getting up something which should take the place of these rivets as a protection of the fly crotch against accidental ripping?

A. My partner, Mr. Elfelt, and myself learned that Mr. R. Gibbons was an inventor. We had a conversation with him and asked him to endeavor to invent something to take the place of the riveted overall.

11 Q. Did Mr. Gibbons afterwards produce the mode of constructing overalls which is described and shown in his patent in suit in this case?

A. He submitted that to us.

12 Q. How long was that after yours and Mr. Elfelt's talk with him?

A. I should think it was within a week.

13 Q. After Mr. Gibbons submitted to you and Mr. Elfelt his new mode of constructing overalls did your firm adopt it?

126 A. We did.

14 Q. How soon after?

A. We had some correspondence with our New York house about the matter, and Mr. Gibbons offered to obtain a patent. We started to manufacture them, as far as my recollection goes, in the spring of 1876.

15 Q. Mr. Gibbons' patent describes and shows two constructions. In one of them a distinct strip of cloth extends from one side to the other of the fly crotch and is sewed at one end to the button-hole strip and at the other end to the button strip. In the other the button-hole strip is itself extended beyond the fly crotch some distance and is there made fast. In which of these two forms—if you made both—did you first use the invention, the separate check piece or the button-hole strip extended across?

Objected to as immaterial.

A. We used the separate check piece first.

16 Q. About how long do you think you continued to make goods with the separate check piece?

A. I think fully one year.

17 Q. And did you then begin to make them with the button-hole strip extending across so as to act as the check?

A. We did.

18 Q. And have made them so ever since?

A. Yes, sir.

19 Q. Are any of these goods, so far as you know, made nowadays with the separate check piece?

A. I know of none.

20 Q. For how many years, so far as you know, have they all been made the other way?

A. About nine years.

127 21 Q. I suppose you think the other way practically preferable to the use of the separate check piece?

A. Very much so.

22 Q. In making your overalls with the button-hole strip extended across so as to serve as the check, how close to the check piece did you bring up the sewing of the crotch seam?

A. Our instructions to the operators were to bring the sewing as close as possible.

23 Q. Prior to the introduction of the Gibbons patent overalls, what price did the riveted overalls command in the California market?

A. They were sold to the trade for $18 to $21 a dozen, according to the quality.

24 Q. Was that as high a price as any other overalls of equal quality commanded?

A. It was a great deal more.

25 Q. What was the effect upon the market price of these overalls on the introduction of the Gibbons patent overalls?

A. They were gradually reduced in price, and the last quotation that I learned they were selling at $9 per dozen.

26 Q. During the same time what variation was there in the price of the Gibbons patent overalls?

A. I think they run from $15 down to $7.50.

Cross-examined by Mr. PLYMPTON:

27 X Q. In your answer to the 16th question you say, in substance, that you continued to make goods with the separate check piece fully one year after Mr. Gibbons produced the thing at the suggestion of yourself and partner, Elfort. Why do you say you think it was fully one year after this time; why not state it positively, if you can?

128 A. My recollection is not strong enough to state it positively ten years ago.

28 X Q. Might it have been, then, somewhat longer than fully one year during which you and your partner made the overalls with the separate strip?

A. What I wish to state is about one year. It might have been a month longer or not, but my best recollection is that we abandoned using the check piece after the first year.

29 X Q. Is that statement, now, the best that you can give at this time and as positive as to date as you can make it after the lapse of ten years?

A. It is.

30 X Q. What did you and your partner say to Mr. Gibbons in the interview you have referred to concerning overalls, as near as you can recollect?

A. We told him we desired to manufacture an overall which

would not rip at the crotch and which would not come in conflict with the riveted overall. That contained the main features. There were many other matters spoken of which I cannot repeat now.

31 X Q. Cannot repeat them because you do not recollect them, or have you some other reason for not wishing to repeat them?

A. I do not recollect the conversation. If I did I would repeat it to you fully.

Redirect:

32 Q. Was the riveted overall patented?

A. Yes, sir.

Recross:

32 X Q. Did you know a man by the name of Lubin, who had a patent on overalls strengthened in the crotch?

Objected to as incompetent.

129 A. I knew a man by the name of Lubin.

33 X Q. Did you know or ever see overalls made like his patented description?

Objected to as not open on cross-examination.

A. If you describe it to me then I can tell you. I don't know what it is.

34 X Q. You don't know what what is?

A. The description.

35 X Q. Did you ever see the Lubin patent?

A. What do you mean by patent—the paper?

36 X Q. Do you know what a patent is?

A. I do.

37 X Q. Do you know what the Lubin patent is? Did you ever see it? Can you swear you never have read it?

A. If you refer to the description as issued from the Patent Office, I know it.

38 X Q. I refer to that, and now, with your knowledge of it, describe the overalls patented in it.

Objected to as incompetent and as not open.

A. I cannot do so, as I did not charge my memory with it. I read it; I did not charge my memory with it.

39 X Q. Do you mean to say that you cannot describe the overall patented in the Lubin patent, which you say you have read and know?

Same objection.

A. I do.

40 X Q. Do you say that you cannot describe the Lubin patented overall because you do not now recollect what that description in the patent is?

Same objection.

130 A. I do.

41 X Q. Then your recollection is not very good nor retentive about such things, is it?

A. What things?

42 X Q. Descriptions concerning the construction of overalls.

A. My recollection is good on any matter that I charge my memory with, but I do not remember everything I read years ago.

43 X Q. You bought the Lubin patent, did you not, for $300?

A. I did not; nor for any sum.

44 X Q. Did your company, the present complainant, buy it and do they own it?

Same objection.

A. Not to my knowledge.

45 X Q. Did you ever see a pair of overalls at any time made by Lubin and known as the Lubin overall?

Same objection.

A. I did not.

46 X Q. And you can't tell me how Lubin's overalls were strengthened in the crotch, can you?

Same objection.

A. I cannot.

47 X Q. When did you know Lubin, in California?

A. Yes, sir.

48 Q. When for the first time?

A. That is a hard matter for me to say; perhaps, seven or eight years ago; it may be longer.

49 X Q. Why is it a hard matter for you to say and why may it be longer?

131 A. I have sold goods to Mr. Lubin and cannot exactly remember when I first met him.

50 X Q. Why is it a hard matter for you to say and why may it be longer than seven or eight years?

A. That was the answer.

51 X Q. Why is it a hard matter for you to say and why may it be longer than seven or eight years since you first met Lubin? Is it because you do not recollect or is it from any other good reason?

A. I cannot recollect every person I have met in California for the last twenty years, when and where. There is no other reason why I shouldn't tell it.

52 X Q. Then it is twenty years since you first saw Lubin in California?

A. I did not state so.

53 X Q. If you saw Lubin there seven or eight years ago, can't you fix definitely the time?

A. I cannot.

54 X Q. How many persons compose the Patent Clothing Company, Mr. Goldsmith?

Same objection.

A. The firms of H. Wallace & Sons, Newstadter & Co., Elfelt, Levi & Co., and R. Gibbons. I am of the firm of Elfelt, Levi & Co., now in liquidation, having gone out of business three years ago, but the members of the firm continue their interest in the Patent Clothing Company, plaintiffs in this suit.

55 X Q. Was the Mr. Lubin you knew in California Mr. David Lubin?

A. Yes.

SOLOMON GOLDSMITH.

Adjourned till to-morrow, April 7, at 11 a. m.

132 NEW YORK, *April 7th*, 1887.

Met pursuant to adjournment.

Present: Causten Browne, Esq., for complainant; Gilbert M. Plympton, Esq., for defendant.

EMIL WEIL, a witness produced on the part of the complainant, having been sworn by John H. Ives, by consent, deposes and says as follows:

1 Q. What is your name, age, residence and occupation?

A. Emil Weil; forty-one years old; New York city; I am in the shirt business.

2 Q. Were you formerly engaged in the manufacture of overalls; if so, in whose factory?

Objected to as immaterial.

A. I have been engaged about seventeen years in the manufacture of overalls. I have been in different factories. Fourteen years of that period in the factory of Stern & Co., and the last three years of that period with H. Wallach's Sons.

3 Q. When did you leave Wallach?

A. Two years and four months ago.

4 Q. While at Stern & Co.'s did you make overalls constructed as to the fly front like the article now shown you, marked Complainant's Exhibit Old Construction?

A. I did.

5 Q. Afterwards, while at Wallach's, did you make overalls constructed with the button-hole strip of the fly front extending across the crotch seam and fastened to the button strip so as to act as a stay or check to prevent the accidental ripping of the crotch seam?

133 A. I did.

6 Q. In what capacity were you employed at Stern's and at Wallach's?

A. In the first years at Stern's I was employed as a cutter; later years at the same place as a foreman; and at Wallach's I have been employed as foreman of the factory.

7 Q. What, if any, practical advantages in the making of the garment have you found in having the button-hole strip extended across the crotch of the fly and attached to the button-hole strip as

compared with the old construction, in which the button-hole strip passes down into and forms part of the crotch seam? I mean to ask you as to the question of facility of handling the goods in manufacturing and of attaching the parts together by the operation of sewing.

A. It saves on the part where the overall is joined together to sew through about three or four less thicknesses, which always has been a very difficult thing to overcome, especially in heavy goods; and then, when the machine was forced to sew through so many thicknesses the needle generally cut the goods. By all that it bulged up in that place. It was always a weak point there by having so many plies of stuff coming together, and we have been forced in former years, in order to strengthen this point, to even sew a piece of leather over it so as to protect the point where all those seams were run in together, which certainly did not add to the comfort of the overall, neither simplified the manufacture of the same.

8 Q. When you do not have the button-hole strip run down into the crotch seam to be sewed in with that seam, but have it extended across and attached to the button strip, does it make any difference in the facility with which the parts composing the crotch
134 seam are placed in position and held in position to be accurately sewed?

A. I don't quite understand that. (The question being repeated.) It makes a difference.

9 Q. Explain how.

A. As you get away with the old-style fly you have, reckoning the seams into it, three less thicknesses of stuff to sew.

10 Q. Does this make it easier to place and hold the parts together for the crotch seam when it is to be sewed?

Objected to as a leading question.

A. Undoubtedly.

11 Q. If you are going to have the button-hole strip extended across the fly crotch and fastened to the button strip (as shown, for example, in Complainant's Exhibit Gibbon Construction Claim 2) instead of having it pass down into and form part of the crotch seam, what, if any, change must be made in the shape of the button-hole strip?

Objected to as immaterial.

A. You must cut the button-hole strip straight.

12 Q. Instead of what?

A. Instead of the old form of cutting the fly round.

13 Q. Do the two articles now shown you represent the lower end of the button-hole strip as straight in one and round in the other in the sense in which you use those terms?

Objected as leading; question withdrawn.

14 Q. Will you produce the articles illustrating what you
135 mean by cutting the button-hole strip straight and what you mean by cutting it round?

Objected to as leading, inasmuch as this witness has referred to two samples, by counsel.

A. Yes; this is straight.

The articles produced by the witness *is* put in evidence by the complainant and marked Exhibit Weil A.

Defendant's counsel objects to the introduction of the so-called Exhibit Weil A, as it is not a voluntary production on the part of the witness, but it is a thing which has been previously handed to him by counsel.

This is round.

The article produced by the witness is put in evidence by the complainant and marked Exhibit Weil B.

Same objection as last.

15 Q. What would be the objections to preserving the rounded form of the lower end of the button-hole strip if you were going to have the button-hole strip extended across the fly crotch, so as to serve as a stay?

A. It would, in the first place, bulge on the inside; and, in the second, throw the strength to just one point; that's all.

16 Q. Should the front edge of the extension of the button-hole strip lie along flush with the front edge of the button strip?

Objected to as leading.

136 A. It should.

17 Q. And, if I understand your previous answer, when it does so lie along flush, the opposite or rounded part of the extension will bulge when the fly is fully open?

Objected to as leading.

A. It will.

Cross-examined by Mr. PLYMPTON:

18 X Q. Before your examination to-day were you shown by counsel and Mr. Gibbons or either of them or by any one else these things which are marked Exhibit Weil A and B?

A. I was.

19 X Q. And who showed them to you?

A. Mr. Browne.

20 X Q. Who else?

A. That's all.

21 X Q. And when did you see these two things, Weil A and B, for the first time?

A. This morning about eleven o'clock.

22 X Q. Do you know who made them?

A. I do not.

23 X Q. You did not?

A. No, sir.

24 X Q. Suppose you take this Exhibit Old Construction and sew on it a strip of cloth for a bridge, as shown in figure 4 of

the Gibbons patent, 178,287. When the two parts of the fly are brought together or closed as they are in use, would or not the bridge shown in figure 4 make a bulge in the crotch?

A. Not necessarily.

25 X Q. Would it at all form a bulge under any circumstances?

137 A. If you take too thick a cloth, it will; if a thin material, it will not.

26 X Q. Kindly look at this Exhibit Old Construction once more, and describe, referring to this exhibit, just where you have been accustomed in former years "to sew the piece of leather over it so as to protect the point where all those seams were run in together," as stated by you in reference to your answer to the 7th direct question.

A. I will take the Exhibit Old Construction and mark with ink a triangular outline which will represent the piece of leather I referred to.

27 X Q. Now, state in words, looking at the exhibit as you have marked it, and describe just how that leather was fastened, what it covered, and where you put it.

A. The triangular leather was put right where the two parts of the overall or garment joined together, projecting about an eighth or a quarter of an inch over the stitching across the fly and button side.

28 X Q. And that triangular piece of leather covered the seams and the sewing at the crotch, extending over all of them and acting as a seam protector and stay for the seams at the crotch of the overall, did it not?

A. It did.

29 X Q. Now, from your answer to the seventh question, about which we had been talking, it would seem that you had made overalls with this leather for a number of years. Can you state how long, in your experience, you used that leather on the old construction overalls?

A. About twelve years.

30 X Q. Do you mean twelve years from date?

A. No.

138 31 X Q. About how many years from the present time have you known the triangular piece of leather to be sewed on the crotch?

A. About fifteen or sixteen years.

32 X Q. State, if you please, Mr. Weil, whether you ever knew that triangular piece of leather to be sewed sometimes on the outside and sometimes in the inside of the crotch of garments like that shown in the old construction.

A. I only seen it sewed on the outside.

33 X Q. It would seem from your answer to the seventh question that you not only made garments like the old construction with the triangular piece of leather, but sometimes without it—that is, sometimes one way and sometimes the other. Is that true?

A. Yes; lots of them both ways.

34 X Q. Did you, in your experience, also know of the Strauss

overalls having a rivet in the crotch for reinforcement? Patented by Levi Strauss, of California, I believe.

A. I did.

35 X Q. How long, Mr. Weil, had you known the Strauss overalls?

A. Way back. I can't say. I can't fix the year.

36 X Q. In your experience as an overall-maker, did you sometimes put the triangular piece of leather you have talked about at the angle of the pocket openings to keep them from tearing out or to strengthen them?

A. I did.

37 X Q. And do you know that the Strauss overalls had rivets at the pocket openings for that purpose?

A. I do.

38 X Q. Now, turning once more to this Exhibit Old Construction, when the triangular leather patch was not sewed on by you, what did you depend upon to reinforce or strengthen the seams at the
139 crotch? Was it the cross-seam and additional stitching shown in the Exhibit Old Construction?

A. Yes.

39 X Q. And was that cross-seam and additional stitching for the purpose of staying the seams at the crotch as in the old construction?

A. Why, certainly; it couldn't hold together without.

40 X Q. In your experience as an old overall-maker, were the overall that you made, as you state, always stitched in every case precisely as this Exhibit Old Construction is stitched at the crotch or did that stitching vary in form, as the case might be, from time to time, sometimes straight across, sometimes at an angle?

A. They ought to have been made like this old construction. I don't know. I didn't manufacture overalls for a good time now.

41 X Q. Then you can't, at this time, state whether in the overalls made during your experience the staying at the crotch was always stitched as in the Exhibit Old Construction or whether that stitching varied in form and direction to some extent or sometimes?

A. It was my business not to pass them except they were.

42 X Q. Is that the best answer you can give to the last question?

A. Yes.

43 X Q. Can you swear that all of the overalls made under your previous supervision were stitched at the crotch precisely like that old construction?

A. I cannot.

44 X Q. Why not?

A. Because I might have passed or taken in some which were not.

45 X Q. Why do you think it possible that you may
140 have passed some overalls that were not stitched at the crotch precisely like the Exhibit Old Construction?

A. We are all sinners, and sometimes do not always attend to our business.

46 X Q. Do you know a person by the name of Benjamin Lindauer?
A. I do.
47 X Q. Did you know him well?
A. No.
48 X Q. Did he have an office at Wallach's, where you were employed?
A. I guess he did. I ain't sure about that.
49 X Q. Do you know whether Lindauer made a reinforced or stayed overall?
A. I don't.
50 X Q. You never saw overalls that were said to be made or sold by Lindauer, did you?
A. I have seen overalls of Lindauer, but never examined them.
51 X Q. You don't know whether those overalls you saw of Lindauer's were stayed or not?
A. I don't.
52 X Q. You know nothing about their construction?
A. I do not.

EMIL WEIL.

Adjourned to to-morrow, April 8th, at 12 noon.

NEW YORK, *April* 8, 1887.

On motion of complainant's counsel examination further adjourned to Saturday, April 9, at 12 o'clock.

141 NEW YORK, *April* 9, 1887.

Met pursuant to adjournment.

Present: William A. Jenner, Esq., for complainant; D. A. Carpenter, Esq., for defendants.

RODMOND GIBBONS, Esq., a witness produced on the part of the complainants, having been duly sworn, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?
A. Rodmond Gibbons; fifty-nine years old; residence, New York, and occupation, secretary and manager of the Patent Clothing Company (Limited), complainant in this suit.
2 Q. Are you also a stockholder in complainant?
A. I am.
3 Q. How long have you been such secretary and manager?
A. Since the organization of the company, in March, 1883.
4 Q. Does the complainant issue licenses to manufacture under the patent in suit?
A. Yes.
5 Q. What opportunities have you had and availed of for knowing the overalls made by complainant's licensees and the form in which the patented invention in suit has been used by them?
A. The opportunity afforded by traveling through the different cities where overalls are manufactured extensively and of communicating with men conducting the manufacture and of inspecting their

products; also the opportunities afforded by correspondence with the various manufacturers in different parts of the country;
142 also the opportunities I have had of obtaining knowledge respecting the manufacture of overalls in New York city.

6 Q. Then, have you kept yourself informed of the ways in which the patented invention has been used by the complainant's licensees since its invention?

A. To as large an extent as possible.

7 Q. What extent was possible?

A. To the extent that I have had by personal intercourse or seen samples of manufacture or receiving information by letter from those who were manufacturing goods under the patent in suit, and this embraces numerous large manufacturers of overalls in various places.

8 Q. Then, do you know in what form the patented invention has been used by complainant's licensees since the incorporation of complainant?

A. Generally speaking, yes.

9 Q. To what extent has the form of the patented invention, consisting of a check piece made integral with the button-hole strip, as illustrated in complainant's exhibit now offered in evidence and marked Gibbons No. 1; to what extent has such form been used by complainant's licensees as compared with the form shown in Fig. 4 of the drawings of the patent?

Objected to on the ground that this exhibit has not been shown to represent any garments by the complainant or under any of complainant's patents, and therefore improper.

Question withdrawn; the offer of the exhibit withdrawn.

10 Q. To what extent has the form of the patented invention, consisting of a check piece made integral with the button-
143 hole strip, been used by complainant's licensees, as compared with the form shown in Fig. 4 of the drawings of the patent?

A. None of our licensees have ever manufactured any overalls, as far as my extensive knowledge goes, after the method shown in Fig. 4 of the patent.

11 Q. Prior to the incorporation of complainant, did any of the present licensees of complainant use the form shown in Fig. 4?

Objected to as immaterial.

A. Yes.

12 Q. And have they abandoned that use and have they adopted the form where the check piece is integral with the button-hole strip?

A. Yes.

13 Q. Are you acquainted with the mode of strengthening or protecting the crotch seam of overalls by means of metal rivets?

A. I am.

14 Q. Do you know whether that mode is now used at all in this country?

Objected to as immaterial.

A. I do.

15 Q. What is the fact?

Same objection.

A. It is used to some extent at San Francisco; it is not used this side of Ogden as far as I have seen, and I have been in the salesrooms and examined the stocks of most of the large manufacturers of overalls this side of Ogden.

Cross-examined by Mr. PLYMPTON:

16 X Q. The riveted overalls you refer to as being used
144 on the Pacific coast is the so-called Strauss patented overall, are they not?

Objected to for indefiniteness.

A. The copper-riveted overall is called by many the "Strauss patent," but in fact they contain the Davis patent. Most manufacturers recognize the improvements of the copper rivet as the Strauss patent, because as Levi Strauss Company first made use of the patent and introduced it in the market, whereas Davis was never known as a manufacturer of overalls, as far as my knowledge extended.

The answer from and including the words "but in fact" objected to as not responsive by complainant's counsel.

17 X Q. Miners and other classes of laborers use the Strauss patented overalls extensively, do they not, or don't you know?

Objected to as immaterial.

A. Not having been in California for some years, I cannot answer that question positively.

18 X Q. In other words, you don't know now whether the matter inquired of in the last question is so or not? Is that what you mean?

A. I mean I have no visual evidence of such a fact.

19 X Q. Well, do you know from information or from your own knowledge whether the Strauss patented overalls are extensively used on the Pacific coast?

A. It is impossible for me to know of my own knowledge, assuming that my positive knowledge must be based on visual observation.

145 20 X Q. How many kinds of garments, such as pantaloons, overalls, drawers, and such like, with reinforced crotches or gores, are made under the five or six different patents which the Patent Clothing Company, plaintiff in this case, advertise to own and grant licenses under?

Objected to for indefiniteness, as immaterial, as incompetent, and not within the scope of the direct, and the witness is instructed not to answer.

A. In obedience to counsel, I decline to answer the question.

21 X Q. You are the manager of the business of the Patent Clothing Company, plaintiff in this case, are you not?

A. I am.

22 X Q. Tell me how many patents for strengthening the crotch and gores of garments the plaintiff company owns and grants licenses under?

Complainant's counsel makes the same objection as last and gives the same instruction to the witness.

A. In obedience to instruction of counsel, I decline to answer.

23 X Q. Have you any knowledge as to the number of patents the plaintiff company in this suit own for reinforcing the crotch and gores of garments and under which they grant licenses to manufacturers?

Complainant's counsel repeats the last objection and the instruction to the witness.

A. I repeat the last answer.

24 X Q. Your company, the plaintiff in this case, issue licenses, do they not?

146 A. They do.

25 X Q. Have you a copy of or can you get a copy of or form of one of the licenses the company issue?

Objected to as immaterial and as not the best evidence, and no foundation for the question laid, as the by-laws of the company presumably contain and describe what power the secretary and manager has.

A. I have not a copy of one of the licenses nor of one of the license forms. I have no authority to present a license, but I can obtain a blank form of license.

26 X Q. State whether these blank forms of license contain all of the patents owned by your company.

Objected to as not the best evidence, and witness is instructed not to answer.

A. I decline to answer by instruction of counsel.

27 X Q. State whether your company own more than the patent on which this suit is brought.

Objected to as immaterial, irrelevant, incompetent, not cross-examination, and the witness is instructed not to answer.

A. I repeat my last answer.

28 X Q. State how many different kinds of garments with reinforced crotches and gores you have known in the course of your extensive experience in such matters?

Objected to on the ground stated in the last objection, and on the further ground of indefiniteness, and the same instruction is repeated to the witness.

A. I repeat the last answer.

147 29 X Q. Look at the paper which I now hand you and which is a printed notice headed "Office of the Patent Clothing Company, Limited, 23 Thomas street, New York. To the public: The Patent Clothing Company, Limited, has purchased the 'Gibbons' and Neustadter patents, covering improvements for strengthening the crotch of overalls and similar garments.

These patents were granted in 1876 and 1877, and the company is advised by its counsel and experts, *to* have carefully investigated the whole subject, that they are foundation patents, and cover all modes of strengthening the crotch, which consists substantially in extending across the crotch seam a reinforcing piece, irrespective of how far up on either side the fly opening such piece may extend, or whether or not such piece is integral with or formed from the fly facing or other part of the garment, or whether or not it is a single piece or is made of two or more pieces attached together by stitching or by connecting links of metal or other material.

The obligation, duty, and intention of the company is to protect its licensees in the enjoyment of their exclusive privileges. All goods made under the licenses of the company will bear the company's license ticket. The makers and sellers of infringing goods will be promptly prosecuted in the United States courts as soon as proof of infringement can be obtained.

Since the "Gibbons" and "Neustadter" patents were issued several patents have been obtained for crotch-strengthening devices which consist essentially of the "Gibbons" or "Neustadter" inventions and pretended improvements thereon besides. Many persons

148 suppose that because such so-called improvements are patented they are free to use the whole device. This is a mistake. The law protects the foundation invention, whatever disguise the infringement may take. We caution the public against this snare.

The "Gibbons" and "Neustadter" inventions may be applied to drawers, and the company has acquired the Thompson patented inventions, which are also well adapted to the same purpose. We are now prepared to issue a limited number of licenses to use these inventions upon overalls, pantaloons, or drawers. We have adopted a policy highly liberal to our licensees respecting both rate of royalty and protection under our licenses. Below is a list of the patents owned by the company.

(Signed) PATENT CLOTHING COMPANY
(LIMITED).

Patents.

No. 178,287, dated June 6th, 1876,
Reissue No. 9616, dated March 22d, 1881, } R. Gibbons.
No. 196,693, dated Oct. 30th, 1877,
Reissue No. 9863, dated Sept. 6th, 1881, } D. Neustadter.
No. 250,604, dated Dec. 6th, 1881, D. M. Thompson.
No. 267,281, dated Nov. 7th, 1882, D. M. Thompson.

Now, look at the original printed notice, which has been copied by the magistrate and embodied in my question and made part of the same, and if the paper I now hand you and which has been copied, as stated, is a notice issued by the plaintiff company in this case, and if the list of patents given in that notice are patents owned by your company, you may, if true, decline to answer the question. If

149 the notice handed you and copied, as stated, with a list of patents was not issued by your company, or if the list of patents therein contained are not owned by your company, or if you can say that the notice handed you is not the same notice or does not contain the substance of the notice which you handed defendants' counsel some time since, deny it if you can.

The defendants' counsel states that complainant's counsel instructs the witness not to take the note which is proffered to him by defendants' counsel.

Complainant's counsel objects to the question as immaterial, irrelevant, and for incompetency, as calling for secondary evidence, as not within the scope of proper cross-examination, and is improper both in form and substance, and instructs the witness to make no response whatever; and complainant's counsel now requests the examiner not to put the question to the witness, and to enter upon his record that he has declined to put the question to the witness upon the request of complainant's counsel, and to notify defendants' counsel that if he does not proceed with a proper cross-examination of the witness the deposition will be closed.

Defendants' counsel requests the magistrate to read the question to the witness.

I decline to read the question at the request of complainant's counsel.

Defendants' counsel now reads the question objected to to the witness and asks him to answer it.

150 The complainant's counsel objects to defendants' counsel reading the question, because, as these examinations have proceeded, the practice has been invariably for the counsel on each side to state his questions, which have been recorded by the examiner, who has then repeated them to the witness, who has then answered them, and the answer has been recorded; and if the counsel reads the question, complainant's counsel requests that the examiner take no note of it, and instructs the witness to pay no attention to such reading.

Defendants' counsel now proceeds to read the question to the witness and instructs the magistrate that it is his simple duty to make record of all the proceedings in the case had before him while acting as magistrate, and proceeds now to read the objected question to the witness.

Now, having read the 29th cross-question to you, will you oblige me by answering it?

Complainant's counsel advises witness to pay no attention to it.

Defendants' counsel puts in evidence the printed notice which

was copied in the 29th cross-question, and it is marked Defendants' Exhibit Plaintiff's Circular, April 9, 1887.

Complainant's counsel objects to the defendants' counsel putting in any documentary evidence at this stage of the case, and requests the examiner to decline to mark the paper as an exhibit in the cause. Complainant's counsel further objects to the paper
151 being offered or being marked as an exhibit in the cause on the ground of immateriality, irrelevancy, incompetency, not within the scope of cross-examination, and no foundation for the paper has been made.

The examiner overrules the objections of complainant's counsel and marks the paper Defendants' Exhibit Plaintiff's "Circular," April 9, 1887.

Defendants' counsel states that the cross-examination of Mr. Gibbons is closed.

RODMOND GIBBONS.

Complainant's counsel offers in evidence the subpœna served on Mr. Vermeule, and the same is marked "Complainant's Exhibit Vermeule Subpœna."

Objected to as immaterial.

Adjourned to Monday, April 11, at 3 p. m.

NEW YORK, *April* 11, 1887.

Met pursuant to adjournment.

Present: Wm. A. Jenner, Esq., for complainant; D. A. Carpenter, Esq., representing Mr. Plympton, on behalf of defendant.

EMANUEL WALLACH, having been by me first duly cau-
152 tioned and sworn in the cause aforesaid to testify the truth, the whole truth, and nothing but the truth, deposes and says as follows:

1 Q. What is your name, age, residence, and occupation?

A. Emanuel Wallach; I am 28 years old; I reside in New York, and am a manufacturer of shirts and overalls.

2 Q. Are you connected with the firm of H. Wallach's Sons, and how long have you been connected with it?

A. I have been connected with the firm of H. Wallach's Sons since 1876.

3 Q. Is Isaac Wallach, of that firm, the treasurer of the Patent Clothing Company (Limited), the complainant herein?

A. Yes, sir.

4 Q. Is Mr. Isaac Wallach now ill?

A. He has been feeling ill for the last few days. I have not seen him to-day.

5 Q. Have the firm of H. Wallach's Sons been engaged in the manufacture of overalls, since your connection with it, continuously?

A. Yes, sir.

6 Q. What have you had to do with the business of the firm—that part of it in relation to the sale of overalls?

A. I used to buy the materials and sell goods.

7 Q. What have you had to do with the business of complainant?

A. I have charge of all the license tickets and forward them to the licensees, and keep a record of the same.

8 Q. Does the complainant require its licensees to attach a license ticket to each pair of overalls containing the Gibbons invention?

A. They do.

153 9 Q. And are those tickets furnished by the complainant to the licensees?

A. Yes, sir.

10 Q. Will you state what is the number of license tickets now annually issued by the complainant to its licensees as compared with former years?

Objected to as immaterial.

A. They have gradually increased the issue of tickets from eight hundred thousand to two and one-half millions, which they now issue.

11 Q. Has the complainant issued during the past year two and one-half million of license tickets to be attached to overalls containing the patented invention?

A. They have, if not more.

12 Q. You spoke of 800,000 license tickets being issued. What year was that in?

A. In 1881.

13 Q. And since then the growth has been steadily increasing?

A. Yes, sir.

14 Q. On what grades of overalls is the Gibbons invention used?

A. From the medium grades to the best.

15 Q. In your experience as a salesman of overalls, which overalls do purchasers prefer, material and quality being the same, those containing the old construction, such as is illustrated in Complainant's Exhibit Old Construction, or those containing the Gibbons improvement?

Objected to as immaterial.

A. They prefer those containing the Gibbons improvement.

154 16 Q. Do you ask a higher price for overalls containing the Gibbons improvement as compared with those having the crotch formed as illustrated in Exhibit Old Construction, material and quality otherwise the same?

Same objection.

A. We do.

17 Q. Taking into account the fact that a higher price is asked for overalls containing the Gibbons invention than for those having the old form of construction, which kind do purchasers prefer, material and quality in other respects being the same?

Same objection.

A. They prefer those containing the Gibbons patent.

18 Q. How many licensees has the complainant company got?

Same objection.

A. They have from thirty to thirty-five, if not more.

And being cross-examined by Mr. CARPENTER:

19 X Q. How long has Mr. Wallach been ill?

A. He has been ill from Friday, if I am not mistaken. He has a bilious attack, and has not been down since. He is not seriously ill. He was down for about an hour on Saturday.

20 X Q. Has he not been down this morning?

A. No, sir; I have not seen him in the store since I left.

21 X Q. Have you been there all the time to-day until you came down here?

155 A. I was in the store until 12.30, and then went to my lunch; came back about quarter to two, and from there came here, and I inquired if Mr. Wallach had been down, and was informed that he had not.

22 X Q. So far as you know, is Mr. Wallach any worse to-day than he was Saturday?

A. I can't tell. I haven't seen him, and don't know anything about it.

23 X Q. Are you a member of the firm of H. Wallach's Sons?

A. I am not.

24 X Q. What is your office in connection with the Patent Clothing Company?

A. I have none whatsoever, except to do this for Mr. Wallach, who is the treasurer.

25 X Q. What are these license tickets for?

A. They are put on garments containing the Gibbons extended fly, which are required to be put on by the licensees.

26 X Q. Are they placed on any other garments besides those mentioned in the last answer?

A. They are required to be put on the garments with the extended fly.

27 X Q. Do you have more than one kind of tickets, or are they all alike?

A. We have more than one kind of ticket.

28 X Q. Why do you have more than one kind?

A. Because it is a different arrangement altogether.

29 X Q. What do you mean by that last answer?

A. It does not relate to the overalls.

30 X Q. What does not relate to the overalls?

A. We have one ticket which relates to the extension fly and another one to a pocket.

31 X Q. Have you only two kinds of tickets?

A. We have two kinds only.

32 X Q. Can you state what is on these tickets—what words?

156 A. I cannot. It is impossible to give the dates. I can give you a form, viz., License Patent Clothing Co., Limited, New York.

33 X Q. Why can you not give the dates?

A. Because I never endeavor to remember the dates of the patent. I never have occasion to remember.

34 X Q. Can you state approximately how many dates are on these tickets?

Objected to, as the tickets are the best evidence.

A. I cannot.

35 X Q. Is there more than one?

Objected to as not the best evidence.

A. I believe there is.

36 X Q. Is there more than five?

Same objection, and witness is instructed not to answer.

Witness declines to answer under advice of counsel.

37 X Q. You have had these tickets before you more or less frequently for several years, have you not?

A. Yes; sometimes the tickets were issued with the number of the patent and sometimes with the dates.

All after the word "yes" objected to as not responsive.

38 X Q. What do you understand that these numbers and dates mean?

157 Objected to, as the numbers and dates are not in evidence and the witnesse's understanding is immaterial and irrelevant.

A. The number of the patent and the date of the granting of the patent.

39 X Q. Have you one of these license tickets with you?

A. No; I have not.

40 X Q. Could you have brought one had you been requested to do so?

A. Yes, sir; I could.

41 X Q. Will you produce one?

Objected to as calling on the witness to enter into a contract, and the witness is instructed not to enter into a contract.

Under advice of counsel the witness declines to answer.

The witness is requested by defendants' counsel to produce, as soon as possible after he shall leave the stand to-day, samples of all the license tickets of the complainant about which the witness has testified, that such tickets may be introduced in evidence by the defendant and marked Defendants' Exhibits Complainant's License Tickets, April 11th, 1887.

42 X Q. I understood you to say that the dates and numbers about which you have testified referred to certain patents of the

complainant. To how many patents do these dates and numbers refer?

Objected to as not the best evidence, and the witness is instructed not to answer.

Under advice of counsel witness declines to answer.

158 43 X Q. Did you not say a few moments ago that the reason why the complainant had different kinds of license tickets was that these tickets referred to different patents, and this statement was not put down on the record?

Same objection.

A. I said that the company had two kinds of license tickets—one for pockets and one for overalls.

44 X Q. Question repeated.

Question repeated.

A. I did say so. I said they had different license tickets for different patents.

45 X Q. How many patents are thus referred to on these tickets?

Same objection and same instruction.

Witness declines to answer under advice of counsel.

46 X Q. How many patents does the Patent Clothing Company own and operate?

Objected to as immaterial.

A. I cannot say. It is impossible for me to say. Some they operate and some they do not.

47 X Q. How many do they own?

Same objection.

A. I cannot tell. I am not an officer of the company.

48 X Q. How long have you had charge of these license tickets?

A. Since 1881.

159 49 X Q. Have you had full charge of them from that time to the present?

A. Well, I always did as Mr. Wallach directed. I had charge of the tickets.

50 X Q. Did anybody else excepting you have anything to do with forwarding these tickets to the licensees and keeping a record of them?

A. Once and awhile there was a package forwarded by one of our book-keepers, who informed me of the transaction when I returned. Nearly all of the entries are in my handwriting.

51 X Q. Where are these tickets kept?

A. At the office of the treasurer, Mr. Isaac Wallach.

52 X Q. Have they ever been kept anywhere else?

A. No, sir.

53 X Q. Where is the office of the manager of the Patent Clothing Company?

A. No. 23 Thomas street, New York.

54 X Q. Is that also the treasurer's office?

A. No, sir; it is not.

55 X Q. From who did you receive directions about sending these tickets to the licensees?

A. Mr. Gibbons notifies Mr. Isaac Wallach, the treasurer of the company, by letter, as a general rule, to forward as many dozen as the licensee required, and thereupon Mr. Wallace informs me of the fact and I do as he directs.

56 X Q. Since you first took charge of these tickets, in 1881, have all of them been issued in the name of the Patent Clothing Company?

A. They have not.

57 X Q. For about how long a time have they been issued in the name of the Patent Clothing Company?

A. From the spring of 1883 to the present day.

160 58 X Q. In whose name were they issued prior to that time?

A. In the name of Wallach & Co.

EMANUEL WALLACH.

Subscribed and sworn to before me—
JAMES A. RENWICK,
U. S. Examiner.

161 EXHIBITS.

"COMPLAINANT'S EXHIBIT CERTIFICATE OF INCORPORATION."

STATE OF NEW YORK, } ss:
Office of the Secretary of State, }

It is hereby certified that an original certificate for the formation of a corporation in the class of limited liability corporations, under the corporate name of Patent Clothing Company (Limited), was filed in the office of the secretary of state, under chapter 611, Laws of 1875, entitled "An act to provide for the organization and regulation of certain business corporations," on the fifth day of January, 1883, and that the following is a true and correct copy of said original certificate (the same having been compared with said original) and of the whole thereof:

STATE OF NEW YORK, } ss:
City and County of New York, }

We, the undersigned, Rodmond Gibbons, who resides in the State of California; Albert A. Levi, Henry Neustadter, Isaac Oppenheimer, and Isaac Wallach, all of whom reside in the State of New York, do hereby certify—

That we propose to form a company of the class of limited liability companies pursuant to the provisions of an act of the Legislature of the State of New York entitled "An act to provide for the organization and regulation of certain business corporations," passed June

21, 1875, and the acts amendatory thereof and supplemental thereto, and do hereby set forth:

162 I. The name of said corporation is to be "Patent Clothing Company" (Limited).

II. The object and nature of the business for which the said corporation is to be formed is the manufacture and sale of patented clothing and the granting of rights to others to manufacture and sell clothing under United States letters patent, to be acquired by the company or in which the company shall have an interest, and all business appertaining thereto, and the locality of its business is to be at the city of New York and throughout the State of New York and throughout the several States of the United States of America.

III. The amount of the capital stock of said corporation is to be ten thousand dollars.

IV. The number of shares of which said capital stock shall consist is to be four hundred shares, of the par value of twenty-five dollars each.

V. The location of the principal business office of said corporation is to be in the city and county of New York, in the State of New York.

VI. The duration of said corporation is to be the term of fifty years.

In witness whereof we have hereunto affixed our hands, in the city of New York, on the fourth day of January, 1883.

RODMOND GIBBONS.
ALBERT A. LEVI.
HENRY NEUSTADTER.
ISAAC WALLACH.
ISAAC OPPENHEIMER.

163 STATE OF NEW YORK, }
City and County of New York, } ss:

On this fourth day of January, 1883, before me personally came Rodmond Gibbons, Albert A. Levi, Henry Neustadter, Isaac Oppenheimer, and Isaac Wallach, to me personally known and known to me to be the persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same for the purposes therein set forth.

In witness whereof I have hereunto affixed my hand and official seal, in the city of New York, on the day and date above set forth.

JOHN H. IVES,
[SEAL.] *Notary Public, Kings and New York Counties.*

And it is further hereby certified that upon the filing of said certificate, of which the foregoing is a true and correct copy, on the 5th day of January, 1883, as aforesaid, a license was issued by the secretary of state, pursuant to said act, to the five persons named in and who made and acknowledged said certificate, empowering them as commissioners to open books for subscriptions to the capital stock of said proposed corporation at such times and places as they might determine.

And a verified record of the proceedings of said commissioners having, this 20th day of January, 1883, been filed in the office of the secretary of state, containing a copy of the subscription list to the capital stock of said proposed corporation, together with a copy of the by-laws for said proposed corporation, adopted by the subscribers to said capital stock at a meeting of said subscribers held
164 at No. 23 Thomas street, in the city of New York, at 3 o'clock p. m., on the 15th day of January, 1883, pursuant to the provisions of said act, as appears from said verified record aforesaid, at which subscribers' meeting as aforesaid five directors (being the number provided for in the said by-laws of said proposed corporation) were also chosen, whose names, as further appears from said verified record of proceedings filed as aforesaid, are as follows, to wit:

RODMOND GIBBONS.
ALBERT A. LEVI.
HENRY NEUSTADTER.
ISAAC OPPENHEIMER.
ISAAC WALLACH.

Now, therefore, I, Anson S. Wood, dep. secretary of state, do hereby certify that said corporation, to wit, Patent Clothing Company, Limited, is fully organized in accordance with said act, chapter 611, Laws of 1875, and that all the provisions of said act have been duly observed in the organization of said corporation as hereinabove set forth.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, this 20th day of January, 1883.

ANSON S. WOOD,
[L. S.] *Dep. Secretary of State.*

STATE OF NEW YORK, } ss:
Office of the Secretary of State, }

I have compared the preceding copy of certificate of incorporation with the record thereof remaining in this office in book entitled "Record of Incorporations Number 7," at page 201, and I
165 do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the secretary of state, at the city of Albany, the 25th day of November, one thousand eight hundred and eighty-five.

JOSEPH B. CARR,
Secretary of State.

COMPLAINANT'S EXHIBIT "ASSIGNMENT OF COMPLAINANT GIBBONS' PATENT."

Whereas Rodmond Gibbons, now or formerly of San Francisco, California, did obtain reissue letters patent of the United States of America for certain improvements in pantaloons, which reissue letters patent bear date the twenty-second day of March, eighteen hun-

dred and eighty-one, and numbered 9616, being a reissue of original letters patent No. 178,287, dated June 6th, 1876;

And whereas the Patent Clothing Company, Limited, a corporation organized under the laws of the State of New York, is desirous of acquiring the entire interest therein:

Now, this indenture witnesseth: That, for and in consideration of the sum of one dollar to him, the said Rodmond Gibbons, in hand paid, the receipt of which is hereby acknowledged, and other good and valuable considerations, — have assigned, sold, and set over, and do hereby assign, sell, and set over, unto the said Patent Clothing Company, Limited, the said reissued letters patent No. 9616, dated March 22, 1881, and all the right, title, and interest which I have in the said invention as secured to me by said letters patent, and also
166 any and all claims and demands for damages and profits or otherwise against any and all persons whomsoever arising out of the infringement heretofore of said reissue letters patent, and all my right and interest therein, the same to be held and enjoyed by the said Patent Clothing Company, Limited, for its own use and behoof and for the use and behoof of its successors and assigns to the full end of the term for which said letters patent are granted and any extension thereof as fully and entirely as the same would have been held and enjoyed by me if this assignment and sale had not been made.

In testimony whereof I hereunto set my hand and affix my seal this second day of April, eighteen hundred and eighty-three.

RODMOND GIBBONS.

Sealed and delivered in presence of—
ISAAC WALLACH.
JOHN H. IVES.

STATE OF NEW YORK,
City of New York, County of New York.

On the second day of April, in the year one thousand eight hundred and eighty-three, before me personally came Rodmond Gibbons, to me known and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

JOHN H. IVES, [SEAL.]
Notary Public, Kings and N. Y. Co's.

167 COMPLAINANT'S EXHIBIT "VERMEULE SUBPŒNA."

The President of the United States of America to John D. Vermeule, as president of the Goodyear India Rubber Glove Manufacturing Company, Greeting:

Subpœna Duces Tecum.

We command you that, all business and excuses being laid aside, you appear and attend before James A. Renwick, Esq., an examiner of this court, at the office of Wetmore & Jenner, 206 Broadway (7th floor, room 83), New York city, on the ninth (9th) day of March, 1887, at 11

o'clock in the forenoon, to testify and give evidence in a certain cause now pending undetermined in the circuit court of the United States for the southern district of New York between The Patent Clothing Company (Limited) and H. B. Glover and others, defendants, on the part of the complainant, and that you bring with you and produce at the time and place aforesaid the following books, to wit:

The factory order book or books (so called) for clothing of the Goodyear India Rubber Glove Manufacturing Company for the years 1866 to 1870, both inclusive, and also the factory cloth book or books (so called) of the said company for the same years, now in your custody, and all other deeds, evidences, and writings which you have in your custody or power concerning the premises; and for a failure to attend you will be deemed guilty of a contempt of court and liable to pay all loss and damages sustained thereby to the party aggrieved and forfeit two hundred and fifty dollars in addition thereto.

168 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, the fifth day of March, 1887.

TIMOTHY GRIFFITH, *Clerk.* [L. S.]

WETMORE & JENNER,
Solicitors for Complainants, 206 *Broadway.*

For the reasons set forth in the affidavits of John D. Vermeule and Gilbert M. Plympton let the examination of said Vermeule, as required by the within subpœna, be postponed till Friday, the 11th of March, at 11 o'clock, or such day thereafter as complainant's counsel may prefer, and let the examination noticed in the within copy notice be in like manner postponed.

New York, March 7, 1887.

ADDISON M. BROWN.

170 UNITED STATES PATENT OFFICE.

RODMOND GIBBONS, of San Francisco, California.

Pantaloons.

Specification forming part of Reissued Letters Patent No. 9616, dated March 22, 1881; original No. 178,287, dated June 6, 1876; application for reissue filed February 19, 1881.

To all whom it may concern:

Be it known that I, Rodmond Gibbons, of the city of San Francisco, in the State of California, have invented certain new and useful improvements in pantaloons and other garments of a similar character; and I do hereby declare the following to be a full, clear, and exact description thereof, reference being had to the accompanying drawings, forming part of this specification.

My invention relates to means for strengthening the crotch in the fly of pantaloons, and has for its object to prevent that tension at

R. GIBBONS.
Pantaloons.

169

No. 9,616. Reissued March 22, 1881.

No. 363
Patent Clothing Co. v. Glover et al. p 169.

Fig. 1

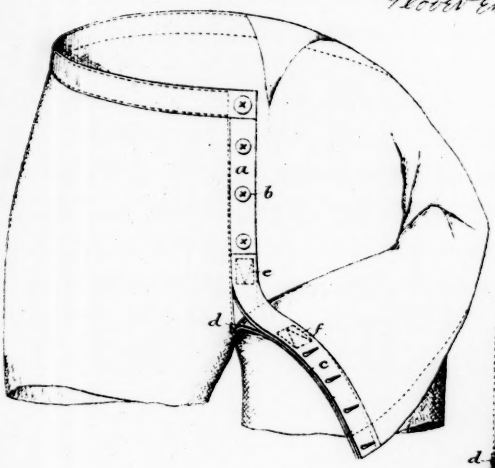


Fig. 4

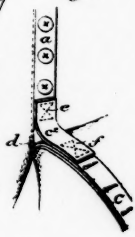
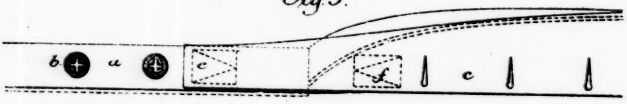


Fig. 2

Fig. 3.



Attest;
Geo. L. Graham
Jacob Felbel

Inventor;
Rodmond Gibbons
by
J. N. McCarter
Atty

the crotch of the fly which is ordinarily produced, either by continued use of the garment or by some undue strain upon the latter, caused by the assumption of some posture by the person wearing it or by some mode of removal of the garment from the body calculated to produce such an effect, and which tension frequently operates to rupture either the cloth or the seams, or both, at the vicinity of the said crotch.

To this end my invention consists in the use, in connection with the fly, of a check piece or strip of cloth or other inelastic pliable material, arranged to bridge over and protect from tensional strain the crotch of said fly, as will be hereinafter more fully described.

My said invention may be employed in the manufacture of all descriptions of pantaloons and other garments of a similar character, its application to such garments adding greatly to the durability of the fly portion thereof by preventing any stretch of the cloth or rupture of the stitching at the crotch of the fly.

To enable those skilled in manufacturing that kind of garments to which my invention is applicable to make and use them with my said invention embodied therein, I will now proceed to more fully describe it, referring by letters to the accompanying drawings, in which—

(Here follows diagram marked p. 169.)

Figure 1 is a front view of the upper part of a pair of pantaloons representing the front of the fly as turned down for the purpose of more clearly illustrating the application thereto of my invention. Figs. 2 and 3 are, respectively, edge and face detail views of the fly portion only of the garment, drawn on an enlarged scale and with the fly distended, in order to more plainly show the improvement added thereto.

At Fig. 4 is shown a modified construction, in which the check-piece, instead of being integral with the button-hole strip, is composed of a separate piece of cloth.

In Figs. 1, 2, and 3 the button-strip of the fly is represented by *a* and the buttons by *b*. The button-hole strip is indicated by *c*, and between its button-holes it is stitched at points to the front of the garment in the ordinary way. The lower end of the button-hole strip *c* is not merely extended down into and fastened at the crotch *d*, as is the case in the common construction of pantaloons, but bridges over and extends beyond the crotch *d*, and is securely stitched to the button-strip *a*, as shown at *e*. The said button-hole strip is also very firmly secured to the garment below the lowest button-hole, as indicated at F.

At Fig. 4 is shown, instead of the preferred form of my invention, a construction in which a separate piece of cloth, c^2, serves as the bridge or check-piece. This construction I consider as involving the broad scope of my invention; for, although in this form the button-hole strip has its lower end secured at the crotch *d*, the latter point is relieved of all strain when the fly is pulled open by the piece c^2, arranged as shown.

My improvement in the specific form seen at Figs. 1, 2, and 3, which show it carried out in the manner preferred by me, adds nothing to the cost of the garment, but, instead, rather cheapens its manufacture, since its attachment to the garment of the lower end of the button-hole strip is effected at a point more accessible than that at which the connection by stitching has heretofore been made.

It will be seen that in a pair of pantaloons made according to my invention, carried out in either of the forms shown, any extreme or sudden distension of the fly that would otherwise tend to strain and rupture it at the point *d* will come wholly upon the check-piece which extends across said point, and that thus the crotch *d* is perfectly protected against injury from the effects of any such strain.

171 Having now fully described my invention in both the shown forms in which it may be practiced, what I claim as new, and desire to secure by letters patent, is—

1. The combination, with the fly of a pair of pantaloons or other similar garment, of an inelastic bridge or check-piece arranged across the crotch of the fly, and operating substantially as described, to receive any strain occasioned by the spreading apart of the fly, and which would otherwise be exerted upon the crotch of the fly.

2. It combination with the fly portion of a pair of pantaloons or other similar garment, a check-piece made integral with the button-hole strip of the fly, and adapted to prevent any tension at the crotch *d* that might operate injuriously upon it.

In testimony whereof I hereto subscribe my name this 18th day of February, 1881.

RODMOND GIBBONS.

In presence of—
JACOB FELBEL.
H. JANVIER.

172 United States Circuit Court, Southern District of New York.

PATENT CLOTHING CO. (Limited) *ag'st* H. B. GLOVER, JOHN B. GLOVER, L. C. BISSELL, and A. J. PARKER. } In Equity. No. 2962.

Testimony on the part of the defendants, taken this 30th day of March, 1886, pursuant to notice and under the 67th rule in equity, as amended, before John A. Shields, Esq., an examiner of this court.

Present: G. M. Plympton, Esq., counsel for defendants, and W. A. Jenner, Esq., counsel for complainant.

Counsel for defendants offers in evidence certified copy of reissued patent, dated March 22, 1881, and numbered 9616, issued to Rodmond Gibbons, and it is marked "Def'd'ts' Exhibit A, M'ch 30, 1886, J. A. S., ex'r."

Certified copy reissued letters patent, dated Sept. 6, 1881, and num-

bered 9863, issued to David Neustadter, and it is marked "Defendants' Exhibit B, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of the file wrapper and contents of application for reissued patent No. 9616 of Redmond Gibbons, and it is marked "Defendants' Exhibit C, M'ch 30, 1886, J. A. S., ex'r."

173 Certified copy of the file wrapper and contents of application for reissued letters patent No. 9863, dated Sept. 6, 1881, and it is marked "Def'd'ts' Exhibit D, M'ch 30, 1886, J. A. S., ex'r."

A pair of overalls which is admitted by complainant's expert to be a specimen of the alleged infringing overalls made by the defendants, and it is marked "Def'd'ts' Exhibit E, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of original patent granted to Rodmond Gibbons June 6, 1876, No. 178,287, and it is marked "Def'd'ts' Exhibit F, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of original letters patent ganted to David Neustadter, dated Oct. 30, 1877, No. 196,693, and it is marked "Def'd'ts' Exhibit G, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of file wrapper and contents of application for letters patent granted to David Lubin on the 12th day of August, 1884, No. 303,578, and it is marked "Def'd'ts' Exhibit H, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of file wrapper and contents of application for original letters patent of Rodmond Gibbons, No. 178,287, and it is marked "Def'd'ts' Exhibit I, M'ch 30, 1886, J. A. S., ex'r."

Certified copy — file wrapper and contents of application for original letters patent of David Neustadter, No. 196,693, and it is marked "Def'd'ts' Exhibit K, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of letters patent granted to David Lubin Aug. 12, 1884, No. 303,578, and it is marked "Def'd'ts' Exhibit L, M'ch 30, 1886, J. A. S., ex'r."

174 Certified copy of letters patent granted to John H. Andrus on the 28th March, 1871, No. 113,128, and it is marked "Def'd'ts' Exhibit M, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of letters patent granted to Irving A. Howe Aug. 8, 1871, No. 117,885, and it is marked "Def'd'ts' Exhibit N, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of letters patent granted to Norman H. Bruce Feb'y 16, 1875, No. 159,891, and it is marked "Def'd'ts' Exhibit O, M'ch 30, 1886, J. A. S., ex'r."

Certified copy letters patent granted to W. S. Taylor Sept. 23, 1873, No. 143,198, and it is marked "Def'd'ts' Exhibit P, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of letters patent granted to Joseph H. Walker Nov. 1, 1870, No. 108,948, and it is marked "Def'd'ts' Exhibit Q, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of letters patent granted to Baker C. Young July 23, 1872, No. 129,776, and it is marked "Def'd'ts' Exhibit R, M'ch 30, 1886, J. A. S., ex'r."

Certified copy of letters patent granted to John B. Glover Feb'y

3, 1880, No. 224,175, and it is marked "Def'd'ts' Exhibit S, M'ch 30, 1886, J. A. S., ex'r."

It is consented by compl't's counsel that Patent Office copies uncertified may be substituted for certified copies of the letters patent put in evidence as above in each instance, and with the same force and effect as if the same had been certified.

Adjourned at request of compl't's counsel to Saturday, the 10th day of April, 1886, at 11 a. m., and ten days' further time is added to def'd't's time for putting in proofs in consequence of this adjournment.

175 NEW YORK, *April 10th*, 1886—12 o'clock m.

Met pursuant to adjournment.

Present: G. M. Plympton, Esq., of counsel for defendants, and E. Wetmore, Esq., of counsel for complainants.

Adjourned till 3.30 p. m. to-day.

3.30 P. M.—after adjournment.

Present: G. M. Plympton, Esq., of counsel for defendants, and E. Wetmore, Esq., of counsel for complainants.

Mr. HENRY B. GLOVER, a witness produced on the part of the defendants, being duly sworn, deposes and says:

1 Q. Please state your name, age, residence, and occupation.

A. Henry B. Glover; age, 50 years; I reside in Dubuque, Iowa; I am a merchant and manufacturer.

2 Q. What do you make and sell?

A. Clothing of different kinds.

3 Q. With whom, if any one, are you engaged in business?

A. John B. Glover, Lester C. Bissell, Alonzo J. Parker, in Dubuque, Iowa.

4 Q. How long have you been engaged in the business of manufacturing and selling clothing of different kinds?

A. About twenty years.

5 Q. And have you in your business made and sold overalls?

A. I have.

6 Q. And did your concern make and sell the overalls marked Ex. E, March 30, 1886, now handed you?

176 A. Yes; this is our construction.

7 Q. And when did you first make and sell overalls like the ex. referred to? I refer particularly to the reinforcing feature.

A. We reinforced garments like this in June, 1879.

8 Q. Do you mean by your last answer that in June, 1879, you and your concern made and sold overalls re-enforced in the manner shown in Ex. E?

Objected to as leading.

A. We did.

9 Q. How do you fix the date as June, 1879, when your concern made and sold overalls re-enforced like Ex. E?

A. I fix the date that we applied for the patent in July, and that we commenced making the garments about a month previous.

10 Q. State whether the patent date, Feb. 3, 1880, on the label sti-ched on the overall, Exhibit E, is the patent you refer to in your last answer.

A. It is.

11 Q. Prior to, say, January, 1881, did or not you or your firm make or sell for the open market overalls re-enforced as is Exh. E?

A. We did.

12 Q. Was the quantity of these overalls referred to that you made or sold prior to 1881 large or small?

A. Limited.

13 Q. Can you state, generally, about the number?

A. I could not.

14 Q. Would it amount to as much as 100 dozen?

A. Yes, sir; previous to 1881.

Cross-examined by E. WETMORE, Esq.:

15 X Q. Did you sell any prior to the application for the patent of Feb. 3, 1880?

A. We did.

177 16 X Q. To what extent, as near as you remember?

A. I couldn't tell.

17 X Q. Have you a retail department?

A. No.

18 X Q. Did you have in June and July, 1879?

A. My impression is not.

19 X Q. And can you give any idea how many of these overalls you had made prior to the application for the patent?

A. I could not.

20 X Q. Was the manufacturing department under your personal supervision?

A. No, sir.

21 X Q. Do you remember when you first saw one of the overalls like the exh. completed?

A. We made them in June, 1879, when I first saw them.

22 X Q. You say that you fix it in June, 1879, because it was about a month before the application for the patent. Is that the only way that you fix the date as being June, 1879?

A. It is.

23 X Q. Do you remember whether you saw one pair or a quantity?

A. I saw one pair, the first I ever saw of any.

24 X Q. Do you remember who showed that pair to you?

A. John B. Glover.

25 X Q. Do you remember seeing any more than that pair before the 28th day of July, 1879?

A. I did.

HENRY B. GLOVER.

Sworn before me—

JOHN A. SHIELDS,

Examiner, &c.

Adjourned till Tuesday, April 13, 1886, at 2 p. m.

Further adjourned to April 20th, at 10 a. m., same place.

178 Further adjourned to April 27th, 1886, at 11 a. m., same place.

Further adjourned to May 10, 1886, at 2 p. m.

NEW YORK, *May 10th*, 1886.

Met, by agreement, at 12.30 p. m.

Present: G. M. Plympton, Esq., of counsel for defendants, and Causten Browne, Esq., and W. E. Jenner, Esq., counsel for complainant.

JOHN E. EARLE, a witness produced on the part of the defendants, being duly sworn, deposes and says:

1 Q. Please state your name, age, residence, and occupation.

A. John E. Earle; age, 55 years; I reside in New Haven, Connecticut; I am a solicitor of patents.

2 Q. What experience, if any, have you had concerning patents, particularly as applied to garments?

A. For more than thirty years I have been engaged in soliciting patents, during the early part of the same in connection with mechanical drawing, but since 1862 exclusively in connection with patents, and during which time I have personally prepared more than 7,000 applications for letters patent in the United States and foreign countries. During the past fifteen years I have testified as expert in a large number of patent cases in the United States courts. As solicitor of patents I have procured many patents relating to the construction of garments of wearing apparel of various kinds, and have frequently examined into the state of the art pertaining thereto to ascertain the novelty of inventions, and the scope and validity of letters patent for inventions in wearing apparel.

179 3 Q. Have you examined and do you understand original letters patent No. 178,287, dated June 6th, 1876, and issued to Rodmond Gibbons, for an improvement in pantaloons, being the original of the reissued patent in suit? Compare with that original patent Complainant's Exhibit Defendants' Overalls No. 1, J. A. S., examiner, and state such differences or similarities as you find between the overalls and the garments described in his original patent, and whether or not, in your opinion, the overalls exhibited embody the invention shown, described, and claimed in that patent.

A. I have examined the patent and made the comparison referred to. I understand the invention to relate to peculiar construction of the opening of fly front of pantaloons, and which has for its object to steady and hem the parts at what is commonly called the crotch—that is, where the two sides of the fly meet. On one side buttons are applied to what is commonly called the button strip, on the opposite the corresponding strip is provided with button-holes, and so that the two sides may be buttoned together to close the front. In the general or common construction of pantaloons the button-hole strip extends down to and is fastened at the crotch or intersection of the two sides, so that whatever strain there may be between the two

sides must necessarily be sustained at the crotch. To prevent the tension at the crotch ordinarily produced by any undue strain the inventor shows and describes a bridge across the crotch extending from a point on one side along the crotch to a corresponding point on the opposite side above the crotch; the bridge at the two points mentioned is firmly secured, and so that the strain which would otherwise be brought directly upon the crotch is taken by the bridge, and the tension at the crotch consequently prevented, the width of the bridge being shorter than the length of the two sides below the bridge, and as clearly illustrated in Fig. 2 of the drawing of the patent. The construction described and illustrated makes the bridge as a part of the button-hole strip, and in describing it the inventor says:

180

"The lower end of the button-hole strip does not extend down and fasten into the crotch *d*, as in the common construction of pantaloons, but bridges over the crotch, being securely stitched at *e* to the bottom strip *a*. The button-hole strip is also firmly secured at *f* below the lower button, thus leaving the part of the button strip between the two parts of connection detached and independent of the crotch, and so that the entire strain will be brought upon the bridge and as clearly indicated in Fig. 2, where a clear space is shown between the crotch and bridge.

As a modification in the construction of the bridge figure 4 shows it as made from a piece separate from or not integral with the button-hole strip, but in this modification there is the same independence of the bridge and crotch, whereby the strain, from whatever source it may come, cannot extend down into the crotch, but must be above and independent of the crotch.

I understand the invention, as recited in the claim of the original patent, to be for a piece of stout, flexible material, arranged across the crotch but not extending down into or fastened at the crotch, but its two ends secured to the opposite sides at points so far down the crotch that when strain is brought upon the two sides tending to separate them the bridge or piece so introduced and secured will take the entire strain, leaving the two sides from the said points of connection down to the crotch free from possible strain thereon.

Comparing Defendants' Exhibit E with the original patent in question, I find this exhibit to be a pair of pantaloons open at the front and provided with buttons at one side of the opening and corresponding button-holes upon the opposite side, whereby the front may be closed and secured—that is to say, what is commonly called fly-front pantaloons.

181

In the exhibit I find the button-hole strip on one side extends down to and is fastened into the crotch; it is extended a slight distance upon the inside of the button strip on the opposite side.

I do not find in this Exhibit E a bridge of any character from one side above the crotch to the corresponding front on the opposite side; but, on the contrary, whatever strain is brought upon the two sides to separate them must be resisted entirely at the crotch, there being no other possible resistance than that afforded directly by the extension of the button strip down to the crotch, where it is fastened.

The construction found in Exhibit E, so far as it relates to the construction in question, cannot be better described than in the words of the specification in the original patent, defining the previous construction in order to distinguish between such common construction and the invention of the patent, to wit: "The lower end of the button-hole strip does * * * extend down and fasten into the crotch *d*," and consequently cannot be the bridge which the inventor, after such reference to the well-known construction, proceeds to describe.

For these reasons I am of opinion that Exhibit E does not contain the invention illustrated or described in said original patent or as recited in the claim thereof.

4 Q. Have you read — are you familiar with the reissued letters patent No. 9619, dated March 22, 1881, being the reissue of the original patent referred to in the preceding question and the reissue on which this suit is brought? Compare with this reissue defenddants' overalls, Complainant's Exhibit 1, and state wherein the overalls differ or resemble the thing described and claimed in the reissued patent, giving your reasons for any opinion you may express.

182 A. I am familiar with the reissued patent referred to in the question. The illustration of said patent is substantially the same as that of the original patent, and, as I understand it, the specification describes the same invention as that described in the original patent.

I take into consideration the fact that the paragraph beginning at line 63 in the specification of the reissue is somewhat changed from the original, as will appear by a quotation from the two in the following parallel columns:

ORIGINAL.	REISSUE.
The lower end of the button-hole strip *does not extend down* and fasten into the crotch *d*, as in the common construction of pantaloons, but bridges over, &c.	The lower end of the button-hole strip *c is not merely* extended down into and fastened at the crotch *d*, as is the case in the common construction of pantaloons, but bridges over, &c.

I don't understand the introduction of the word "merely" to imply that the strip is extended down into the crotch—that is to say, that it is used in the sense of not only—but, on the contrary, that the word "merely" is necessarily used to emphasize the fact that the old construction was a mere pretence of strength—that is to say, if the button-hole strip is simply extended down into the crotch it is insufficient to withstand the strain which may be brought upon it; and in this opinion I am confirmed by the quotation in the original patent, wherein the inventor says: "The button-hole strip does not extend down and fasten into the crotch."

The first claim of the reissue is the single claim of the original patent, the slight changes in expression in no way qualifying the claim, as I understand it. The second claim of the reissue, which is a new and additional claim, recites as the invention, as I under-

stand it, the forming of the bridge which extends from one side above the crotch to the opposite side above the crotch, from
183 the same piece as the button-hole strip, and which, under such construction, does not extend down into the crotch, but I understand the bridge to be the same bridge as that recited in the first claim, the connection at the two ends of the bridge being necessarily such that the strain cannot be transmitted down into the crotch, but, on the contrary, as recited in the claim, prevents any tension at the crotch.

Comparing now Complainant's Exhibit E with the reissued patent, I am of the opinion, for the reasons which I have given in my last answer, that the said Exhibit E does not embody the invention illustrated in the drawing described in the specification or recited in either of the claims of said reissued patent.

5 Q. Now, Mr. Edward S. Renwick, complainant's expert, states in his answer to the 3d direct question that he finds the defendants' overalls, Complainant's Exhibit No. 1, contains in substance the combination of the second claim of the Gibbons reissue No. 9616. State whether such is also your opinion. Give your reasons for any statement you may make concerning the matter enquired of.

A. Under the understanding which I have given of the word "merely," introduced into the reissued specification with reference to the "common construction of pantaloons" I cannot agree with Mr. Renwick. If, however, this word "merely" introduced into the reissue is to be understood as to deny the positive statement made in the original specification and to include the extension of the button-hole strip down into the crotch, and also if the specification is to be understood as dispensing with the bridge which spans the crotch, and the second claim is to be construed to be broadly for the extension of the button-hole strip down into the crotch and up onto the opposite side, and whereby whatever tension or strain there is will be brought directly at the crotch, then I could agree with Mr. Renwick that the said Exhibit E embodies the invention of the second claim so construed, but as
184 neither the original patent nor the reissue shows such a construction, nor do I find any warrant in the specification of the original patent or in the reissue for such a construction of the claim, I cannot agree with Mr. Renwick in his conclusions. It is true in figure 4 of the illustration, in both the original and reissue patents, the button-hole strip is illustrated as extending down and fastened into the crotch, apparently substantially as in Exhibit E; but this is what the inventor describes as a common construction at the time of his invention, and has not the bridge over the crotch, which is shown in that figure, and which bridge is the very invention alleged in the original patent, and, as I understand it, constitutes an essential feature of both the claims and of the reissued patent.

Again, if the second claim of the reissued patent is to be construed broadly for the extension of the button strip across the crotch, irrespective of the drawings or description, then I could agree with Mr. Renwick that Exhibit E embodies the second claim of the

reissue; but I don't find any warrant in either of the original or the reissue patents for such an understanding of the said second claim, but, on the contrary, the original patent, by its drawing, specification, and claim, requires the introduction and formation of a bridge across the crotch which shall not extend down into the crotch, but shall be so independent thereof as to prevent any extension at the crotch. If, then, the 2d claim of the reissued patent is to be construed so broadly as to include Exhibit E as an infringement thereof, then, as I understand it, that claim must be understood to be for an invention not hinted at in the original patent.

Adjourned to Tuesday, May 18, 1886, at 11 a. m.
Further adjourned to Tuesday, May 25, 1886, 11 a. m.

185 NEW YORK, *May* 25, 1886—11 o'clock a. m.

Met pursuant to adjournment.

Present: R. Gibbons, Esq., for the compl't and G. M. Plympton, Esq., of counsel for defendant.

The examination of Mr. JOHN E. EARLE continued:

6 Q. Consider the first and second claims of reissue 9616 and point out the material differences between these two claims, so far as the alleged infringement in Complainant's Exhibit Defendants' Overall No. 1 is concerned, and in so doing consider the original and reissue patent- in their entirety.

A. I have considered the two claims of the reissued patent in connection with defendants' overalls as called for by the question, and in my opinion the difference between the two claims of the reissue resides in the fact that whereas the first claim of the reissue patent is substantially the same as the single claim of the original patent, and for the invention which is described in the specification and shown in the drawing of the original patent and for nothing more, the invention so claimed being, as I understand it, for overalls or pantaloons with the reinforcement wholly and substantially different in construction and operation from that found in the Exhibit Defendants' Overalls, the second claim is by the term and expressions therein employed apparently not confined to the construction of overalls, &c., illustrated in the drawing and described in the specification of either the original or reissued patent in suit—that is to say, by ingenious phraseology the second claim, by excluding the specification and drawing, may be understoood to include the re-
enforcement of the crotch at the fly, irrespective of any pecu-
186 liarity of construction, and under such understanding of the claim to include the Exhibit Defendants' Overalls, and in this respect the second claim is materially different from the first claim.

In comparing the original with the reissue as called for by the question the opportunity for inserting this comprehensive second claim seems to have been the object of the reissue, since its introduction constitutes the only material change from the original patent except it be the word "merely," to which I have before referred. For this change I find no warrant either in the patentee's invention

or in his original patent, expressed or implied, as I have before stated.

In my opinion that defendants' overalls do not infringe the original patent or the first claim of the reissue I am confirmed by the testimony of complainant's expert, Mr. Renwick, from the fact that he excludes the said first claim of the reissue in considering the question of infringement of defendants' overalls upon said reissued patent.

7 Q. Now, Mr. Earle, having carefully considered the original patent of reissue of 9616, could you, as one skilled in such matters, construct the re-enforced device and apply it to the overalls or pantaloons without other aid than such as you can gather from the drawing, description, and claim of the said original patent to Gibbons, No. 178,287?

A. I could. The drawings and specifications are such a full, clear, and exact description of the invention recited in the claim that any person skilled in the art to which the invention pertains could without the slightest difficulty apply the re-enforcing device of said original patent. In fact the description and illustration is so clear and exact that a person of ordinary intelligence capable of understanding a clear description and illustration would have no difficulty in applying the invention if not skilled in the particular art.

187 8 Q. If you have read and understood letters patent No. 224,175, of February 3, 1880, granted to J. B. Glover, compare defendants' overalls, Complainant's Exhibit No. 1; with the description contained in such patent overalls and state whether, in your judgment, the said Exhibit Overalls are made in accordance with the description contained in the said patent.

A. I have read and understand the patent referred to in the question and have compared these with the Exhibit Def'ts' Overalls, and I find the said overalls to be made in strict accordance with the description and illustrations of the patent referred to in the question.

9 Q. Compare the two sample overalls now handed you with the description and drawing in the Gibbons reissue No. 9616, on which this suit is brought, and state whether, in your opinion, the said samples are made in accordance with the description and drawings of the said reissued patent.

A. I have made the comparison, and I refer first to the pair of overalls which I will call figure 1. In these overalls the button-hole strip is secured to one side from its upper end down to a point near the crotch, and at this point, which is below the lower button-hole, is secured by extra stitching. From that point the strip extends across to the opposite side, where its end is secured to that side at a point below the lowest button. The length of the strip between the opposite points in connection is less than the combined length of the two sides from the points of connection of the button-hole strip to the crotch. This construction is the same as that illustrated in figures 1, 2, and 3 of the drawings of the reissued patent and clearly described in the specification.

In these overalls, if the two sides be taken in the respective hands

and strain applied, it will be found that a portion of the button-hole strip between the two points of connection comes into a straight line or plane with the two sides, as illustrated in figure 2 of the drawing of the reissued patent, and that the crotch portion between the
188 two points of connection is loose and free, as shown in said figure 2, there being no connection whatever between the bridge and the crotch part below.

Def'ts' counsel puts in evidence the two sample overalls referred to by the witness in his last answer, and the same are marked Def'ts' Exhib. Overalls, Fig. 1, May 25, 1886, J. A. S., ex'r.

Referring now to the second pair of overalls, I find the button-hole strip extending down into and fastened in the crotch, as in the common construction of pantaloons, being prior to the date of the patent in controversy. Across the crotch is a strip of inelastic material secured upon one side below the lower button-hole and above the crotch; extending across to the opposite side is secured at that opposite side at a point above the crotch and below the lower buttons. The length of the strip is less than the combined length of the 2 sides from the points where the strip is attached down to the crotch, and with no connection between the said strip and the two sides below, so that the said strip forms a bridge or stay between its two points of connection above and independent of the crotch.

The construction of the staying device is the same as that shown in Fig. 4 of the drawings in patent in suit, and differs only from Exhib. Figure 1 in the fact that in the said Exhib. Fig. 1 the button-hole strip, instead of extending down into the crotch in the usual manner, is left detached at the crotch and extends across to the opposite side to form the bridge, whereas in the reissued construction the bridge is found in a separate piece.

In both these overalls referred to the same bridge — across the crotch, taking the strain at points each side of and above the crotch and with no connection whatever between the bridge and the crotch portion below.

189 Def'ts' counsel offers in evidence the reissued pair of overalls referred to by witness, and they are marked Def'ts' Exhb. Overalls, Fig. 4, May 25, 1886, J. A. S., ex'r.

10 Q. Now, with the garments themselves before you, Exh's Fig. 1 and Exh. Fig. 4, made in accordance with the Gibbons reissue in suit, and the Exh. Def'ts' Overalls, made in accordance with the Glover patent, what points of difference in the actual construction, so far as the opening of the front is concerned, do you find?

A. In Exh. Def'ts' Overalls I find the button-hole strip extends down to the crotch, as in manner well known long prior to the patent in suit, but the said strip from the point where it is secured at the crotch is continued or extended up inside the opposite or button-hole strip. The extension of the strip is firmly secured from the crotch upward. There is no disconnection at the crotch, as in Exhs. 1 and Exh. Fig. 4, but the contrary, and whatever strain is brought upon the two sides is necessarily carried at the crotch.

In Exh. Fig. 1 this button-hole strip is not extended down into and fastened at the crotch, as in Exh. Def'ts' Overalls, but, on the contrary, bridges over and extends beyond the crotch entirely free and independent of the bridge and so that by no possibility can the strain upon the two sides be communicated to or in any degree resisted at the crotch.

In the Exh. Fig. 4 the lower end of the button-hole strip does extend down and is fastened into the crotch, as in the common construction of pantaloons and as in Comp't's Exh. Def'ts' Overalls No. 1, but instead of the button-hole strip extending up upon the opposite side and secured thereto from the crotch upward, — in said Exh. No. 1, the button-hole strip stops at the crotch, as in the common construction.

In Exh. Fig. 4, as I have described, the bridge or stay piece
190 is an independent piece introduced between the two sides, connected at the ends only and so as to form a bridge above and independent of the crotch. This independent bridge or stay in Def'ts' Exh. Fig. 1 and Fig. 4 constitutes the essential and material difference between Def'ts' Exh. Fig. 1 and Fig. 4 and the said Exh. No. 1, and in consequence of this difference no part of the strain is resisted at the crotch in said Exh. Fig. 1 and Fig. 4, but in the Exh. Def'ts' Overalls the entire strain is resisted at the crotch.

11 Q. Can you, Mr. Earle, in a few words, state what is, if any, the invention shown in the comp't's overalls, Def'ts' Exh. Fig. 1 and Fig. 4, and what the invention is as it is shown in def'ts' overalls, Comp't's Exh. Def'ts' Overalls No. 1?

A. The complainant simply takes an ordinary pair of overalls and supplies an adjunct in the shape of a bridge piece which spans the crotch, as in Exh. Fig. 4 or as in Exh. Fig. 1. He makes the bridge as a part of the button-hole strip of the fly instead of a separate piece, as in Exh. 4, and that is all he does, the gist of the invention being the same in both, to wit, the bridge or stay across, above, and independent of the crotch. In both cases the crotch is substantially the old and well-known construction.

The defendants' invention implies no bridge or any equivalent therefor, but, on the contrary, he adds to or alters this common construction at the crotch by causing the end of one strip of the fly to pass or lap beyond the crotch onto the other part or side. There is no stay introduced across the crotch; it is this omission of the stay piece across the crotch and the extension of one side beyond the crotch to overlap the other side that constitutes the invention in defendants' overalls, such extension avoiding the connecting seam between the two sides found in Fig. 1 and Fig. 3 of the drawing of the patent in suit and in the common long-known construction. I
have used the term reinforced as meaning an additional
191 thickness to resist the strain, there being no such added thickness in Exh. Def'ts' Overalls at the crotch seam. I have said there is no reinforce in the sense that I have used the term reinforced as applied to complainant's construction of overalls; but in the sense that the crotch is strengthened by the peculiar construction in Def'ts' Exh. Overalls over what it would be were the two

sides connected in the usual manner so as to form a seam in the fly at the crotch, the crotch may be said to be reinforced.

12 Q. If you are familiar with and understand the matters contained in letters patent No. 303,578, granted to David Lubin Aug. 12, 1884, the application for which was filed July 3, 1875, being Def'ts' Exh. L, please state what you understand the invention to be as therein shown, described, and claimed. State fully, with your reasons for your statements.

A. I find the patent referred to to illustrate and describe certain improvements in overalls. The object of the invention, as stated in the specifications, is "to strengthen and re-enforce those points, particularly the crotch seam at the fly opening, at which the garment is liable to be ripped or torn in use," and the invention illustrated and described, as I understand it, consists of a single strip of material applied to the two sides of the front opening or fly, the said strip extending down one side of the opening across the crotch and up the opposite side, and so that the two sides of the opening are formed in one continuous piece, and so that as the strain comes upon the two sides and is thereby carried to the crotch it will be resisted by the same continuous piece which crosses the crotch, and so as to, in the words of the specification, "effectually prevent the garment from being ripped or torn at the bottom of the fly opening." The strip is stitched to the garment at every point throughout its length.

The invention described and illustrated cannot be better re-
192 cited than in the words of the claim which I quote: "Pantaloons or overalls having a continuous strip extending down the sides of the fly or front opening and crossing the crotch seam at point of junction of the leg portions, said strip being attached to the garment at every point along its length."

Adjourned to Tuesday, June 1, 1886, at 11 a. m.

NEW YORK, *June* 1, 1886—11 o'clock a. m.

Met pursuant to adjournment.

Present: G. M. Plympton, Esq., of counsel for def'ts.

The witness not appearing, an adjournment is taken until Tuesday, June 8, 1886, at 11 a. m.

NEW YORK, *June* 8, 1886—11 o'clock a. m.

Further adjourned to Tuesday, June 15, 1886, at 11 o'clock a. m.

NEW YORK, *June* 15, 1886—2 p. m.

Further adjourned to Tuesday, June 22, 1886, at 11 o'clock a. m.

NEW YORK, *June* 22, 1886—11 a. m.

Further adjourned to Tuesday, June 29, 1886, at 11 a. m.

NEW YORK, *June* 29, 1886—11 a. m.

Further adjourned to Tuesday, July 13, 1886, at 11 a. m.

NEW YORK, *July 13th*, 1886—11 a. m.

Further adjourned to Friday, the 23d of July, at 11 a. m.

193 NEW YORK, *July* 23*d*, 1886—11 a. m.

Further adjourned to Tuesday, 24th of August, 1886, at 11 a. m.

Further adjourned to Friday, September 10th, 1886, at 11 a. m.

Further adjourned to Wednesday, September 15th, 1886, at 11 a. m.

NEW YORK, *October 29th*, 1886—1 p. m.

Met pursuant to notice.

Testimony on the part of the def'ts taken under and by the annexed consent in the following four suits:

U. S. Circuit Court, Southern District of New York.

PATENT CLOTHING Co., Limited,
vs.
H. B. GLOVER, JOHN B. GLOVER, L. C. BISSELL, and A. J. PARKER.

SAME
vs.
ISAAC ROSENSTEIN and HERMAN HESSEL.

194 SAME
vs.
JACOB STERNGLANZ and MAURICE H. BAUMGARTEN.

SAME
vs.
ISAAC FRANK, ABRAM KAHN, and EDWARD FRANK.

Present: Mr. W. A. Jenner, for complainant, and Mr. G. M. Plympton, for defendants.

BURRITT M. HOTCHKISS, a witness on the part of the defence, being duly cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth, in answer to interrogatories propounded by Mr. PLYMPTON says:

1 Q. What is your name, age, residence, and occupation?

A. Burritt M. Hotchkiss; am 65 years of age; I reside at Naugatuck, Connecticut; I have been in the India-rubber business since 1850.

2 Q. In what capacity have you been connected with the rubber business?

A. Since 1857 I was superintendent of the Goodyear Glove Manufacturing Co. The company is located at Naugatuck, Conn. The president of the company is John D. Vermule.

3 Q. As superintendent of this rubber company, state what you know about strengthening the gores and crotches and seams of the goods made by your company.

195 A. Well, we put gores between the fingers of the gloves, use them in the split tail of officers' coats, and use them in air work, air cushions and beds, water bottles and beds, for strength-

ening the crotch of pants and overalls, and use them in pockets for coats.

4 Q. If you have any samples illustrate the construction you have named in your answer as above, and kindly produce such samples.

A. As requested, I now produce some samples, one of which, I will call A, is a piece of air cushion; another, which I will mark B, is another piece from the sample marked A. The sample which I marked C is a portion of an invalid cushion. A pair of gloves, marked D, and a pair of gloves, marked E, complete the samples, which I now produce, excepting one little piece of the water bottle, which I mark F.

5 Q. Now state, if you please, Mr. Hotchkiss, how long you have known air cushions having the construction shown in the samples A, B, and F.

A. Twenty years.

6 Q. State whether during the twenty years you speak of the air cushions have been made always with the connecting strip or piece which is shown in the samples A, B, and F and which I designate on the samples with a small *a*.

Objected to as leading.

A. Yes; they have always been made that way.

7 Q. State what you mean by the saying, "they have always been made that way."

Same objection.

A. Well, I mean that we have never made them in any other way.

8 Q. State what enables you to say you have known air cushions with the connecting strips as shown in the samples A, B, and C for 20 years.

Same objection.

196 A. Well, I have been there all the time and have seen them made and know no other way to make them.

9 Q. State whether or not your company have made air cushions continuously for the past 20 years having the construction shown in the samples A, B, and C.

Same objection.

A. We have made them so that we have kept a stock on hand all the time. Of course we haven't made them continuously. Of course the stock might have got out a few days; didn't give attention to the stock all the time.

10 Q. Has your company kept on sale for the past 20 years, to your knowledge, air cushions constructed like the samples A, B, and C?

Same objection.

A. Yes.

11 Q. State, if you know, how old these samples marked A, B, and F are.

A. I do not know.

12 Q. State whether they are of recent make.

A. Well, that I don't know.

Defendants' counsel puts in evidence the samples A, B, and F, and they are marked Defendants' Exhibits A, B, and F.

13 Q. Referring now to the gloves which are marked D and E, state how long you have known gloves to have been made by your company re-enforced between the fingers as is shown in the samples referred to.

Objected to.

A. For the last 25 years at least.

14 Q. How have you happened to know about such gloves for that length of time?

A. Up to 1858 we made them a little different from that; they were re-enforced, but in a different way. About that time we
197 made them different, and put in the re-enforcing just as you see them now in the gloves D and E.

15 Q. State whether your company have kept in stock for the past 25 years gloves like the sample re-enforced as D and E.

Same objection.

A. Yes.

16 Q. State whether your company have during the past 25 years made such gloves so kept in stock.

Same objection.

A. Yes; they have.

17 Q. State, if you please, what this sample is marked C.

A. It is a piece of an invalid cushion.

18 Q. How long have you known invalid cushions made like the piece marked C?

A. Twenty years; more than twenty years; made during the war—the war of '61 and '65.

19 Q. How do you fix the length of time you have known this invalid cushion?

A. We made large quantities of them during the war.

20 Q. State whether your company have made invalid cushions like this sample C at any time since the past 25 years.

A. Yes; we made them and kept them in stock all the time during the past 25 years.

21 Q. State whether the gloves D and E, the sample air cushions A, B, and F, and the invalid cushion like sample C were, during the times you state you have known them, made under your direction as superintendent of the Goodyear India Rubber & Glove Manufacturing Co.?

Same objection.

A. Yes.

Def'ts' counsel puts in evidence the sample gloves marked
198 D and E and the sample air cushion marked C, and the same are marked Def'ts' Exhibits D, E, and C, 29th October, 1886.

Cross-examined by Mr. JENNER:

22 Q. From where did you get these samples?
A. At our factory.
22½ Q. When?
A. Within two or three weeks.
23 Q. Have the things of which these exhibits are samples been made in your factory from patterns—that is, have different parts been cut from patterns before they were put together?
A. They are cut from patterns or measures.
24 Q. Of what materials are the patterns made?
A. They are made of paper, made of tin, some of zinc, and some of cloth—that is, cloth magnetized or cemented and put together with rubber to stiffen it.
25 Q. Has your company kept a pattern book?
A. No; I don't think we have of patterns.

BURRITT M. HOTCHKISS.

Sworn to before me—
JOHN A. SHEILDS, *Examiner.*

Adjourned to Saturday, October 29th, at 11 a. m.
Adjourned to Monday, 1st of November, 1886, at 11 a. m.

NEW YORK, *November 1st*, 1886—11 a. m.

Met pursuant to adjournment.
Present: Counsel as before for defendant and Mr. Rodmond Gibbons for complainant.

Mr. JOHN D. VERMEULE, being called as a witness on behalf of the defendants and duly sworn, deposes as follows:

1 Q. What is your name, age, residence, and occupation?
199 A. John D. Vermeule; aged sixty. I reside at 9 W. 47th street, N. Y. city, and am by occupation president of Goodyear India Rubber Glove Manufacturing Co.
2 Q. How long have you been connected with the Goodyear India Rubber Glove Manufacturing Co.
A. Since May, 1870.
3 Q. When was this company of yours organized?
A. In 1844.
4 Q. And has it been doing business from that date to the present time?
A. It has, sir; continuously.
5 Q. What is the business of your company? State it briefly.
A. It is the manufacturing and selling of every variety of rubber goods.
6 Q. And are you familiar with the various goods your company manufactures and sells?
A. Yes.

7 Q. And for how long a time have you been so familiar?

A. Since 1870.

8 Q. State where the factory of your company is located and where are stores at which its goods are sold.

A. The factories are at Naugatuck, Conn., and its own stores at 503 and 505 Broadway and 205 Broadway. We have agencies in the principal cities and all over the Union.

9 Q. State whether you have occasion to inspect the factories of your company, and state who is the superintendent of your factories.

A. Yes; I go there on Tuesday of every week for this purpose. Mr. Frederick F. Schaffer is the superintendent, and Mr. Burritt M. Hotchkiss is the consulting superintendent and vice-president of the company, residing at Naugatuck.

200 10 Q. State whether you have, on the occasions of your visits, seen the various kinds of goods in process of manufacture at your factories.

A. Yes.

11 Q. State whether you would recognize pieces and samples of different kinds of goods that have been made at your factories if they were shown you.

A. Yes; I think so.

12 Q. Look at these various pieces which I hand you and state, if you know, what they are.

A. I do recognize these pieces, and I find them to be as follows: Three of the sections marked Def'ts' Exh's A, B, and F are sections of air cushions; Def'ts' Exh. C is a section of an invalid air cushion.

13 Q. State whether you have seen air cushions and invalid air cushions like the exhibits named in your last answer; and, if yes, when, where, and under what circumstances.

Objected to as leading.

A. I have seen them in our stock on the shelves and at the factories.

14 Q. For how long a time have you seen air cushions in the shops and factories of your company having the construction shown in the Def'ts' Exh's A, B, C, and F?

Same objection.

A. Ever since my first connection with the company, in 1870.

15 Q. Look at these, if you please, Mr. Vermeule, and state what they are.

A. This one, with a hole in the middle, is an invalid air cushion. This one, that is rectangular in shape, without a hole, is a chair air cushion, and this, with a strap and neck, is a water bottle.

16 Q. State, if you please, what enables you to recognize the water bottle and two cushions referred to in your last answer.

201 A. From my finding them in the stock of the company and from my connection with the company since 1870. What I wish to express in this answer is that I found goods of the

same construction on the shelves of the company when I went to it, in 1870.

Comp't's counsel moved to strike out the answer as irresponsive.

17 Q. And how long have you known goods in construction like the water bottle and the invalid and chair-seat air cushions to be on the shelves of the stores of your company?

Objected to as leading.

A. Since 1870.

18 Q. Be kind enough to compare the water bottle and the invalid and chair cushions with the sections which are marked Def'ts' Exh's A, B, C, and F and state, if you know, what difference in construction you find between the sections and the water bottle and two cushions referred to.

A. I don't find any difference. They are all the same in construction.

Objected to, as the witness is not shown to be qualified.

Def'ts' counsel puts in evidence the invalid air cushion, which is marked Def'ts' Exh. Invalid Cushion, Nov. 1, '86, J. A. S., ex'r.

Also the chair air cushion, which is marked Def'ts' Exh. Chair Air Cushion, Nov. 1, '86, J. A. S., ex'r.

Also the water bottle, which is marked Def'ts' Exh. Water Bottle, Nov. 1, '86, J. A. S., ex'r.

19 Q. Look at these gloves, which are marked Def'ts' Exh. D and E, and state whether you have ever seen gloves having the construction shown in the exh's, referring particularly to the re-
202 inforcement between the fingers; if yes, state when, where, and under what circumstances.

Objected to as leading.

A. Yes; in 1870, when I became connected with the Co., and in the factories and stores of the Co., and ever since 1870.

20 Q. Look at this pair of overalls which I hand you and state, if you know, where they were made, how long you have known such, and where and under what circumstances you have known them, referring particularly to the reinforcement at the crotch of the overalls.

Objected to as leading.

A. They were made at our factory. They were making similar ones in 1870, and have done so ever since. They have been carried in stock in our stores ever since 1870.

21 Q. When you say you have known, since 1870, overalls similar to the overalls handed you, state as to the identity of the reinforcement of the crotch of such similar overalls with the pair in your hand.

Same objection.

A. The reinforcement was the same.

The overalls referred to by the witness are put in evidence and marked Def'ts' Exh. Rubber Overalls, Nov. 1, '86, J. A. S., ex'r.

22 Q. Look at the coat which I now hand you and state where it was made, how long you have known coats of such construction, referring particularly to the reinforcement of the slit in the tail of the coat, and under what circumstances you have known such coats.

Same objection.

A. The coat was made at our factory. The company has been making coats of the construction shown in the reinforcement
203 of the slit ever since my connection with it, in 1870. I have seen such coats at our factories, and we have sold them from our stores from 1870 to the present time. I have known coats of the construction mentioned in the question 16 years.

The coat referred to is put in evidence by defendants' counsel and marked Defendants' Exhibit Long-tail Rubber Coat, Nov. 1, '86, J. A. S., ex'r.

23 Q. Look at this second coat which I hand you and state, if you know, where it was made, how long you have known coats with reinforcement in the tail like that shown in the coat in your hand, and where you have known such coats, and under what circumstances.

A. The coat was made at our factory. The company has been making coats of the construction shown in the reinforcement of the tail ever since my connection with it, in 1870. I have seen such coats with reinforcement in our factories, and we have sold them from our stores from 1870 to the present time. I have known such coats 16 years so reinforced.

The coat last referred to is put in evidence by defendants' counsel and marked Defendants' Exhibit Short-tail Rubber Coat, Nov. 1, '86, J. A. S., ex'r.

24 Q. You have stated, Mr. Vermule, that air cushions like Def'ts' Exh. Invalid Cushion and Def'ts' Exh. Chair Air Cushion, and the sections of the same marked Def'ts' Exh's A, B, C, and F, and water bottles like Def'ts' Exh. Water Bottle, and gloves like Def'ts' Exh's D and E with reinforcements the same as shown in those exhibits, and overalls with reinforcements the same as shown in Def'ts' Exh. Rubber Overalls, and coats with reinforcement the same in the slit of the tail as is shown in both of Def'ts' Exh's Long-tail and Short-
204 tail Rubber Coats have been made at the factories and sold and kept in stock in the stores of the Goodyear's India Rubber Glove M'f'g Co. ever since your connection with that company, in 1870. State now to what extent goods having the exact construction of the several exhibits referred to in my question have been sold by your company.

Objected to as leading.

A. The manufacture and sale of these goods referred to have been very large all throughout this country and some for export since

1870, to my knowledge. They are all regularly kept in stock, and their manufacture and sale is a matter of every-day occurrence. We have often made 1,800 coats constructed like these Exh's Long and Short Tail Coats in a day.

25 Q. When, in your last answer, you refer to the making and selling of goods like all of the exhibits referred to in Q. 24, state whether or not the reinforcement construction found in the several exhibits was carefully remembered by you in your answer to Q. 24.

Same objection.

A. Yes; I considered and remembered the reinforcement construction in my answer.

26 Q. State now, if you please, Mr. Vermeule, how the re-forcements of the goods which you say were made and sold by your company ever since your connection with it, in 1870, differs from or resembles in point of identity or otherwise the reinforcements as such reinforcements are shown now in each and all of the several exhibits which have been introduced during your present examination, and which I have enumerated in Q. 24, and to which I refer you for their specific identifying names and numbers, the exhibits being now before you.

Same objection.

205 A. They are in principle exactly the same. I mean they are the same, except in some instances they may be a little shorter or a little longer.

27 Q. Please explain what you mean by "they may be a little shorter or a little longer."

A. Why, I mean that in some cases the man who makes the goods might cut the reinforcing strip a trifle shorter in some instances than in others. That is all, making a variation of an inch or a fraction of an inch in the reinforcing strip, and when I am called upon to swear exactly I desire to make that qualification.

28 Q. Aside from this small variation stated in your last answer, please state concerning the identity between the construction and application of the reinforcements as shown in the several exhibits before you and enumerated in Q. 24 and the goods which you say you have known to be made and sold by your company since your connection with it, in 1870.

A. They are the same.

Same objection.

29 Q. Have you more or less knowledge of the goods made and sold by rubber-houses generally in the United States?

A. Yes.

30 Q. Is it within your knowledge that reinforced rubber goods are commonly made and sold by such houses?

A. Yes.

31 Q. How long have you known reinforced rubber goods to be made and sold by the trade generally?

A. Since my connection with this company, which commenced in 1870.

32 Q. What is your knowledge concerning the kind of reinforcement, in point of construction, employed by the rubber trade since 1870 to the present time?

206 A. It is very similar to the exhibits before me and enumerated in Q. 24.

JOHN D. VERMEULE.

Sworn to before me—
JOHN A. SHIELDS, *Ex'r.*

Adjourned to Thursday, November 5th, 1886, at 11 a. m.

NEW YORK, *November 5th*, 1886—11 a. m.

Met pursuant to adjournment.
Present: Counsel as before.
Adjourned by consent to Saturday, November 6th, 1886, at 11 a. m.

NEW YORK, *November 6th*, 1886.

Further adjourned to Tuesday, November 9th, 1886, at 11 a. m.

NEW YORK, *November 9th*, 1886.

Met pursuant to adjournment.
Present: Counsel as before.
Adjourned to Friday, November 12th, 1886, at 11 a. m.

NEW YORK, *November 12th*, 1886.

Further adjourned to Monday, November 15th, 1886, at 11 a. m.

NEW YORK, *November 15th*, 1886.

Further adjourned to Saturday, November 20th, 1886, at 11 a. m.

NEW YORK, *November 20th*, 1886.

Further adjourned to Wednesday, November 24th, 1886, at 11 a. m.

NEW YORK, *November 24th*, 1886—11 a. m.

Further adjourned to Friday, November 26th, 1886, at 11 a. m.

207 NEW YORK, *November 26th*, 1886—11 o'clock a. m.

Further adjourned to November 27th, 1886, at 11 a m.

NEW YORK, *Nov. 27th*, 1886.

Met pursuant to adjournment.
Present: Mr. Plympton, Mr. Rodmond Gibbons.

ISAAC F. WILLIAMS, being produced and duly sworn as a witness on behalf of the defendants, testifies as follows:

1 Q. What is your name, age, residence, and occupation?

A. Isaac F. Williams; reside at Bristol, Rhode Island; age, 53; occupation, superintendent of the National Rubber Company of Providence, R. I., at their factory, at Bristol.

2 Q. How long have you been continuously engaged in the rubber business—commencing at what time?

A. Since 1853, except a part of 1861 to 1864, during the war.

3 Q. State what you know touching the manufacture and use of rubber garments to which reinforcements were applied.

A. In the manufacture of rubber clothing where openings occur or seams made which will receive a strain always, to my knowledge, since 1853, they have been reinforced by strips or other forms of strengthening material, so that when the strain comes on these points they will receive a perfect lateral strain.

4 Q. If you have any garments which will illustrated or show what you mean by the reinforcement described in your last answer please produce them.

A. I have such garments and produce them as requested, and they are as follows: A pair of pants, which are reinforced in
208 the crotch with diamond-shaped reinforce and which also illustrates my meaning of reinforcing at the strap and buckle at the rear.

5 Q. How long have you known the pants referred to in your last answer, reinforced, as shown in such pants?

A. Since 1853.

Pants put in evidence and marked Def'ts' Ex. Williams No. 1, Nov. 27th, 1886, J. A. S., ex'r.

6 Q. If you have any other argument which will illustrate what you mean by reinforcement in your answer to the third question please produce it.

A. I have two others and now produce them, one of which is a pair of overalls which shows the reinforcing at the side openings and also in the crotch between the legs, and the other is a coat which shows the reinforcing of the slit in the rear, also on the inside of the pockets.

The overall referred to by the witness is put in evidence and marked Def'ts' Ex. Williams No. 2, Nov. 27, 1886, J. A. S., ex'r.

Def'ts' counsel also puts in evidence the coat referred to by the witness and it is marked Def'ts' Ex. Williams No. 3, Nov. 27, 1886, J. A. S., ex'r.

7 Q. Please describe the character of the reinforcing devices in each of the several exhibit garments you have referred to, commencing with Exhibit Williams No. 1.

A. In Exhibit Williams No. 1 the crotch between the legs is reinforced, as I have stated before, by a diamond-shaped piece of cloth which is cemented and stitched over the points of contact to prevent any strain from opening them; by stitching I mean with an iron-toothed wheel which runs along the edge of the reinforc-
209 ing piece to imbed the edge of the reinforcing piece in the surface of the rubber of the garment under such reinforcing piece. This imbedding is technically known by rubber men as stitching, because it looks like stitching.

The strap at the rear of Exhibit Williams No. 1, you will notice,

is a combination of the binding around the upper edge of the garment, which continues within about an inch and a half of the opening in the rear of the pants: A reinforcing piece is placed on the garment, which continues about one-half inch beyond the point of contact or joining of the strap to the waistband, the reinforce spanning or going across the point of contact or place of joining, which gives the strap equal strength whether you pull it to the rear or to the front, and so reinforces it.

In regard to Exhibit Williams No. 2 I have only to add to my previous statement concerning it that the reinforcing piece in the crotch of the legs is the same as shown in Exhibit Williams No. 1, except in form, but at the openings in the side of Exhibit Williams No. 2 I have what we call a double reinforcing, the strip around the upper part of the overalls continuing across the bottom of the opening to about one-half inch, with a reinforcing piece across in addition, the reinforcing pieces being cemented and stitched as previously described in regard to Exhibit No. 1—that is, stitching without thread.

In regard to Exhibit Williams No. 3 the reinforcement of the slit or opening at the back of the coat is made in this way: The reinforcing strip begins at the bottom of the tail of the coat and extends along the entire length of opening from the bottom edge of the coat, crosses the bottom of the slit or opening, extending about one-half inch on the other side of such bottom of the opening, and in addition to the reinforcing which I have just described a second reinforcing piece is placed so as to cross or span the bottom of the opening,
210 both reinforcing pieces being cemented and technically stitched to the garment.

The pockets of Williams Exhibit No. 3 are in this way made and reinforced: A pocket patch is cemented on the inside of the coat and a slot cut in the coat to make the pocket opening; now, to reinforce the joint formed by the union of the pocket patch with the body of the coat, a continuous reinforcing strip is cemented to the patch and to the body of the coat so as to extend across the joint formed by the union of the pocket patch to the coat.

8 Q. Now, how long can you say you have known garments reinforced as you have described and as is shown in Defendants' Exhibits Williams 1, 2, and 3?

A. Since 1853.

9 Q. That enables you to say, Mr. Williams, that you have known garments reinforced such as you have described and as is shown in Exhibits Williams Nos. 1, 2, and 3 since 1853?

A. From being connected with the practical manufacture of rubber garments since 1853, and we have never made them reinforced in any other way than that shown in Exhibits Williams 1, 2, and 3 from that time to this.

10 Q. State whether the business of the National Rubber Co. is of an extensive or limited character in the trade.

A. It is considered one of the largest.

11 Q. State whether the sales of garments reinforced as shown in the three Williams exhibits has been extensive since 1853 up to the

present time or whether the sale of such garments was an incident only.

A. The sale of such garments has been very extensive between the limits of time named.

12 Q. If you can, give an approximate estimate of the daily sales or manufacture of garments reinforced as in the three exhibits from 1853 up to the present time.

211 A. I should say about one thousand a day. Our company has made two hundred thousand a year.

13 Q. Are you familiar with the character of reinforced goods made and sold by rubber companies other than your own, in a general way?

A. I am.

14 Q. Would you be able to state, if shown such other goods, whether you had known them on the market or not?

A. I think so.

15 Q. Look at this coat, marked "Def'ts' Ex. Long-tail Rubber Coat, Nov. 1, '86," and state whether you recognize its construction.

A. I do.

16 Q. State how long you have known garments like Def'ts' Long-tail Exhibit referred to on the market. I refer particularly to the reinforcement of the slit in the back of the coat.

A. Since 1853.

17 Q. Look at this coat which is marked Def'ts' Exhibit Short-tail Coat, Nov. 1, 1886, and state whether you recognize it, and how long you have known such coats reinforced as is that exhibit on the market.

A. Since 1873.

18 Q. Also look at the exhibit Def'ts' Exhibit Rubber Overalls, and state how long, if at all, you have known such reinforced overalls on the market.

A. Since 1853.

19 Q. And what can you say concerning the length of time you have known invalid cushions and water bottles and chair air cushions with seams reinforced the same as shown in Def'ts' Ex. Invalid Cushion, Nov. 1, '86, and Def'ts' Ex. Chair Air Cushion, Nov. 1, '86, and Def'ts' Ex. Water Bottle, Nov. 1, '86?

A. Since 1856.

20 Q. And what can you say concerning the length of time
212 you have known gloves with reinforced fingers as is shown in Defendants' Exhibits D and E?

A. Since 1853.

21 Q. State how you are enabled to fix the date since when you have known the air cushions, bottles, and gloves referred to in the preceding question.

A. They have been and are articles of common manufacture and sale on the market from the date I have mentioned to the present time. The dates I mention gloves were manufactured at Naugatuck, Conn., at which place I commenced business; the invalid cushion, water bottle, and air cushion were manufactured by the Union India Rubber Co. at Harlem, New York, at the date named

by me, which was the time I went to their factory from Harlem, having been transferred from the Naugatuck factory to the Harlem factory, both factories belonging to the same company, the Union Rubber Co.

22 Q. State whether water bottles, cushions, and gloves like the exhibits referred to have been from the dates you have named to the present time on sale in large or limited quantities.

A. In large quantities.

23 Q. State whether the technical stitching you have referred to in connection with the reinforce pieces was for mere ornamentation. If not, what other purpose did it subserve, and how?

A. It was placed to imitate thread stitching, at the same time giving an edge or point to embed the surface piece or overlapping parts to the body of the garment. The same result is accomplished by what is termed plain stitching, which is accomplished by a feather-edged wheel which makes a crease instead of a dotted line.

24 Q. State whether this technical stitching of the reinforced pieces of the garments adds anything to the strength of the union between the reinforced piece and the garment to which it is technically stitched, as described by you.

A. It does add to the strength of the union.

213 Cross-examination by Mr. GIBBONS:

25 X Q. Is there or has there been, to your knowledge, any method of reinforcing the weak points in rubber clothing practiced by manufacturers other than the method you have described?

A. None that I know of.

ISAAC F. WILLIAMS.

Sworn before me—
JOHN A. SHIELDS, *Examiner.*

Further introduction of proofs adjourned until further notice.

Circuit Court of the United States for the Southern District of New York.

PATENT CLOTHING COMPANY, Limited,
vs.
H. B. GLOVER *et al.*

SAME
vs.
ISAAC ROSENSTEIN *et al.*

SAME
vs.
ISAAC FRANK *et al.*

214 SAME
vs.
JACOB STERNGLANZ *et al.*

} In Equity.

It is admitted by the counsel for the complainant in the four

above-entitled suits that coats, air cushions, chair cushions, gloves, and overalls, and water bottles, precisely the same as are shown in Defendants' Exhibits "Long-tailed Rubber Coat, Nov. 1, 1886," "Short-tailed Rubber Coat, Nov. 1, 1886," "Chair Air Cushion, Nov. 1, 1886," "Invalid Cushion, Nov. 1, 1886," "Gloves," Exhibits "D" and "E," "Oct. 29, 1886," "Air-cushion Sections A, B, C, and F," "Overalls, Williams, Nos. 1 and 2, Nov. 27, 1886," "Rubber Overalls, Nov. 1, 1886," "Coat, Williams, No. 3, Nov. 27, 1886," and "Water Bottle, Nov. 1, 1886," were each and all of them made and sold at the times and in the manner testified to by B. M. Hotchkiss, J. D. Vermeule, and Isaac F. Williams in their testimony given respectively October 29th, November 1st, and November 27th, 1886; and it is stipulated that A. R. Trotter, of Bristol, Rhode Island, and J. D. Ferguson, of the city of New York, would, if called on as witnesses by the defence, corroborate the statements of said Hotchkiss, Vermeule, and Williams, as given by them respectively on the dates aforesaid; and for the purposes of these suits it is considered that the said Trotter and Ferguson did testify and corroborate said statements.

New York, December 11, 1886.

WETMORE & JENNER,
Complainant's Solicitors.

215 United States Circuit Court, Southern District of New York.

PATENT CLOTHING COMPANY (Limited)
vs.
H. B. GLOVER *et al.* and Three Other Suits by Same Compl't.
} Affidavit of Service.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

Thomas G. Earl, being duly sworn, says that he is employed in the office of G. M. Plympton, the solicitor of the defendants in the above-named suits, and that on the eighteenth day of December, in the year one thousand eight hundred and eighty-six, at about 3 o'clock p. m., he served a duplicate of the annexed notice of taking testimony on Wetmore & Jenner, Esqs., the complainant's solicitors in said actions, at their office, No. 206 Broadway, in the city of New York, by delivering the same to Mr. W. A. Jenner, and, at his request, leaving the same with the boy in charge of the office of said solicitors.

T. G. EARL.

Sworn to before me this 21st day of December, 1886.

[L. S.]

FRED. HEMMING,
Notary Public, N. Y. Co.

216 In the United States Circuit Court for the Southern District of New York.

PATENT CLOTHING COMPANY (Limited)
vs.
H. B. GLOVER *et al.* and Three Other Suits by Same Compl't. } In Equity.

Please take notice that on the 21st day of December, inst., at 11 o'clock in the forenoon, I shall, at my office, No. 245 Broadway, New York city, N. Y., examine witnesses and introduce proofs on behalf of the defendants in the above-entitled causes under the 67th rule in equity, as amended.

The examination will be conducted before John A. Shields, Esq., a standing examiner of this court, or other competent officer, and will be continued from day to day until completed.

You are invited to attend and cross-examine.

Dated New York, Dec. 18, 1886.

Respectfully, G. M. PLYMPTON,
Def'ts' Solicitor.

To Wetmore & Jenner, Esqs., compl't's solicitors.

217 NEW YORK, *December 21st*, 1886.

Met pursuant to notice annexed.

Present: G. M. Plympton, Esq., of counsel for defendants.

After waiting one hour for counsel for the complainant to appear or to be in some way represented—

JAMES D. FERGUSON, a witness on the part of the defendant, being duly sworn and cautioned, and in answer to questions propounded to him by GILBERT M. PLYMPTON, counsel for the defendants, says:

1 Q. What is your name, age, residence, and occupation?

A. My name is James D. Ferguson; age, 49; residence, New York city; and occupation, traveling salesman.

2 Q. By whom are you employed as traveling salesman?

A. By the Goodyear India Rubber Glove Manufacturing Co.

3 Q. How long have you been employed as traveling salesman by that company?

A. Since 1866, certainly.

4 Q. What kind of goods did you sell for that company?

A. Rubber goods of the different kinds that they made, including coats of various kinds, and I sold such goods throughout the United States wherever I could find a market—North, South, East, and West.

5 Q. Look at these two coats which I hand you, Defendants' Exhibit Long-tail Rubber Coat, Nov. 1st, 1886, and Defendants' Exhibit Short-tailed Rubber Coat, Nov. 1st, 1886," and state who made them and whether you sold the same.

A. They were made by the Goodyear India Rubber Glove Manufacturing Co., the house that I have been traveling for since 1866,

and I have sold coats precisely like these, so far as the rein-
218 forcement in the back is concerned, continuously since 1866—in fact, precisely the same as these two coats—during that time, excepting, perhaps, the linings in some cases were not the same.

6 Q. If you sold any other kinds of coats besides those referred to in the last question, please produce such other coat.

A. I did sell numbers of other coats besides those referred to; among them this coat which I now produce (witness producing a coat with a fly-button piece in the back slit of the coat and reinforced).

The coat produced by the witness is put in evidence by the defendants' counsel and it is marked Defendants' Exhibit Ferguson No. 1, December 21st, 1886, J. A. S., ex'r.

7 Q. How long have you sold coats like the one you now produce, and which is marked Defendants' Exhibit Ferguson No. 1?

A. I have sold, as traveling salesman for the Goodyear India Rubber Glove M'f'g Co., coats with the slit or opening in the back, with a fly button-hole strip and with buttons and with a reinforcing or strengthening strip precisely the same as that construction, and as those features are combined and shown in the coat just produced by me and marked "Defendants' Exhibit Ferguson No. 1, Dec. 21st, 1886," since the year 1886, when I first went into the employment of my present employers, the Goodyear India Rubber Glove M'f'g Co. I have sold coats having the reinforcement, button-hole, fly buttons precisely like Defendants' Exhibit Ferguson No. 1 continuously from 1866 to the present time, throughout the United States—North, South, East, and West—wherever I could find customers for them, and during all that time, from 1866 to the present time I have sold thousands of them.

8 Q. State, if you know, by whom that coat, Defendants' Exhibit Ferguson No. 1, was made.

219 A. It was made, I should say, by my present employers, the Goodyear India Rubber Glove M'f'g Co.

9 Q. State how you are enabled to say with certainty that you have sold continuously since 1866 to the present time coats with fly strip, reinforcing strip, and buttons in the back slit of the coat precisely the same as the coat shown in Defendants' Exhibit Ferguson No. 1.

A. In the first place, I found coats having the construction referred to and as is shown in the Exhibit Ferguson No. 1 in the stock of the company when I first went with them, in 1866, and ever since that time I have handled and sold such coats almost daily. I remember that in 1866 the coat was called "Cattlemen's coat." It was made expressly for ranchmen or persons who had to ride on horseback, and its sale was largely to that class of trade. I also, as it is my business to do, have a close and accurate recollection of the construction of the various goods I am called upon to sell.

10 Q. How long have coats like this coat, Defendants' Exhibit

Ferguson No. 1, been made by the Goodyear India Rubber Glove M'f'g Co.?

A. That I cannot say. I only know I found it in their stock when I went with them as salesman in 1866. I presumed, therefore, that it was made and sold by them prior to that time.

JAMES D. FERGUSON.

Sworn to before me—

JNO. A. SHIELDS, *Examiner.*

Adjourned to Wednesday, December 22d, 1886, at 11 a. m.

220 NEW YORK, *December* 22, 1886.

Met pursuant to adjournment.

Present: Mr. Jenner, for complainant; Mr. Plympton, for defendants.

Mr. J. D. VERMEULE, being recalled by the defence, says:

1 Q. Are you the J. D. Vermule who heretofore testified in these cases after being duly sworn?

A. I am.

2 Q. Mr. Vermeule, do you remember testifying to the manufacture and sale of the two coats which are marked Defendants' Exhibit Long-tailed and Short-tailed Coats respectively, November 1st, 1886?

A. I do.

3 Q. Look at this coat which I hand you and which is marked Defendants' Exhibit Ferguson No. 1, December 21st, 1886, and state whether you ever saw it, or coats like it, and if you can say who made it.

Objected to as leading.

A. Yes. This coat, Exhibit Ferguson No. 1, is made by our company, Goodyear's India Rubber Glove Manufacturing Co. Oh, yes.

Any answer further responsive which the witness may make is also objected to, because def'ts' counsel has been dictating to the examiner the answer which he desired the witness to make, this in the witness' hearing and after the witness had answered, as already recorded, the parts which the examiner has stricken out from the answer being that which was not stated by the witness but dictated by the examining counsel.

Def'ts' counsel denies the statement of Mr. Jenner.

221 Compl't's counsel now requests the examiner to enter on the record what did take place.

The examiner says that after the witness had stated, in an answer to the question No. 3, that def'ts' counsel added the words "I have seen it or coats like it before."

4 Q. How long have you been president of the Goodyear India Rubber Glove Manufacturing Company?

A. Since 1882.

5 Q. How long have you been connected with that company?
A. Since 1870.
6 Q. And in addition to the coats, Def'ts' Ex. Long-tail and short-tail Coats, Nov. 1st, 1886, heretofore introduced in evidence in your previous examination, did your company make and sell any other rubber coats? If yes, so state.

Objected to as not direct examination.

A. They did.
7 Q. And if you can produce a sample of such other coats so made and sold, please do so.

Objected to as leading.

A. I produce this coat marked Defendants' Exhibit Ferguson No. 1, December 21st, 1886.
8 Q. What have you to say concerning the making and selling of the coat Defendants' Exhibit Ferguson No. 1, December 21st, 1886? State fully and particularly.
A. The Goodyear India Rubber Glove Manufacturing Company have made and sold the coat made like this since 1870, and during that time have had them in stock and on sale continuously.
9 Q. How many years since 1870 has your company made and sold the coat like the "Exhibit Ferguson No. 1?"

Objected to — leading.

222 A. They have sold it since the 1st May, 1870, up to date.
10 Q. If coats like the coat Defendants' Exhibit Furguson No. 1 were made and sold for any special trade or if they were known by any special name, designating name, state it.
A. They were sold to men who ride on horseback, in cattle business, &c., in South and West. We designated them as an extra long officer's coat, split up in the skirt higher behind.
11 Q. State who sold the coats like the Exhibit Ferguson No. 1 for your company from May 1st, 1870, to the present time.
A. All the salesmen in the employ of the company.
12 Q. Name such of them as you now recollect.
A. Mr. James D. Furguson and I sold them, and others I can't state positively the names now.
13 Q. In your answer to the 8th question on the direct you state that your company "made and sold coats like this since 1870," referring to Defendants' Exhibit Furguson No. 1. State in what particular the coats that were made and sold during the time referred to were like the coat Exhibit Furguson No. 1.

Objected to as leading and improper in form.

A. In every particular they were made like this.
14 Q. State what you mean by "made like this." What do you refer to?
A. I refer to its being split higher behind, with a fly strip with buttons and button-holes in the strip to button or unbutton at will.

Counsel for complainants objects to defendants' counsel repeating to the witness or in the witness's hearing question and answer.

15 Q. In your answer to question 14 you say that the fly
223 strip in the coat you have been talking about were made with buttons and button-holes in strip Please explain this construction more definitely.

A. With buttons and button-holes in the strip; that won't do. What I want to convey is that the buttons are on one side of the skirt and the button-holes are in the strip on the other side of the skirt.

16 Q. Then is your statement in answer to question 14, in the light of your last answer, correct when you say, "With a fly strip with buttons and button-holes in the strip"?

A. No; that is not correct.

17 Q. Now, regarding the coats which you say were made and sold by your company during the period you have named, how was the slit in the back of the coats to which you have referred reinforced as compared with the reinforcement in the slit of Exhibit Furguson No. 1?

Objected to as leading.

A. The same as Furguson Exhibit No. 1.

18 Q. You say that you have been connected with the Goodyear's India Rubber Glove Manufacturing Company since the year 1870. State, if you know, whether the coats which were the same as Exhibit Furguson No. 1 and which was made and sold by that company from 1870 to the present time, as you have said, were made and sold by your company prior to your connection with it.

Objected to as incompetent and as leading.

A. I think they were. I found them in stock when I went there.

19 Q. State generally to what extent the coats like Exhibit Furguson No. 1 were made and sold by your company from 1870 to the present time.

A. There was a good many sold; they run up into the thousands. I should like to have that read. The numbers sold will run up into thousands.

224 20 Q. State where the present factories are and where they have been during your connection with the company.

A. At Naugatuck, Conn.

21 Q. State whether or not it is your business to be familiar with the construction of the goods made and sold by your company.

A. It is.

Cross-examined by Mr. JENNER:

22 X Q. Before you answered the third question to-day, which the examiner will read to you, did you not see and read the exhibit tag which is attached to the coat?

A. I did not until I found it here. I hadn't seen the tag before.

23 X Q. What I mean is, Did you not have in your hand and

read the exhibit tag containing the words "Def'ts' Exhibit Ferguson No. 1, Dec. 21, 1886," before you answered the third question?

A. I did not see that tag until the coat was handed to me by Mr. Plympton.

24 X Q. And when the coat was handed to you did you not look at and read that tag?

A. I was looking for a description there on the size tag; my attention was called to this tag (witness refers to tag named in question) as containing a description.

25 X Q. Then when did you first see that particular coat—I don't mean others like it, but that particular one?

A. I don't think I can name day.

26 X Q. Was it recently?

A. Yes, sir.

27 X Q. How recently?

A. Within a year.

28 X Q. Is that as nearly as you can fix it?

A. Well, I think it is.

29 X Q. And within the year how often have you seen that particular coat?

Counsel for defendants requests complainant's counsel to
225 explain to the witness what he means by that particular coat, whether he refers to the Exhibit Ferguson No. 1 or some other.

30 X Q. You have not understood me as referring to any other coat than that particular coat, Exhibit Ferguson No. 1, have you?

A. I have not.

31 X Q. Now, state how often within the year you have seen that particular coat.

Objected to for vagueness, unless counsel states what he means by that particular coat.

A. I can't tell that.

JOHN D. VERMEULE.

Sworn before me—

JOHN A. SHIELDS, *Ex'r.*

Further taking of proofs adjourned to December 23d inst., at 11 a. m.

NEW YORK, *Dec.* 23*d*, 1886.

Met pursuant to adjournment.

Adjourned to December 27th inst., at 12 a. m., same place.

NEW YORK, *Dec.* 27*th*, 1886.

Met pursuant to adjournment.

Adjourned to Wednesday, December 29th inst., 11 a. m.

226 NEW YORK, *Dec. 29th*, 1886.

Met pursuant to adjournment.
Present: Counsel as before.

Mrs. JANE WARD, being produced and duly sworn as a witness on behalf of the defendants, testifies as follows:

1 Q. What is your name, age, residence, and occupation?
A. Mrs. Jane Ward; age, 54; reside at Naugatuck, Connecticut; occupation, making rubber coats.
2 Q. By whom are you employed?
A. By the glove Co.
3 —. Give the full name of the glove Co. and the name of its president.
A. Mr. Veremule; the Rubber Glove Co.
4 Q. How long have you been employed by the Rubber Glove Co.?
A. Since 1864.
5 Q. And where is that company located—its shops?
A. Naugatuck, Conn.
6 Q. When you went to that Co., in 1864, what was the work on which you were employed?
A. Making rubber coats.
7 Q. And how long did you continue making rubber coats with Co. from 1864?
A. Until two years ago.
8 Q. When you say you were employed in making rubber coats explain what you had to do in this making of the coats.
A. Cementing the seams and putting the coats together.
9 Q. Look at the coat which I hand you and which is marked Def'ts' Ex. Ferguson No. 1, Dec. 21, 1886, and state whether you had to do with the making of coats like that exhibit coat.

Objected to as leading.

227 A. I did.
10 Q. State when for the first time you had to do with the making of coats like this coat, Ex. Ferguson No. 1.

Same objection.

A. In 1864.
11 Q. Look at the slit or opening in the back of the coat, Ex. Ferguson No. 1, and state how long you have known coats with the loose button-hole strip and with the reinforcement or stay made like the button-hole strip and stay in the Exhibit Ferguson No. 1.

Same objection.

A. Since 1864.
12 Q. State how you happen to remember coats with loose button-hole strips and stays like that in the Ex. Ferguson No. 1 as early as 1864.

Same objection.

A. Making reversible coats to be worn either side so as the button didn't show through.

13 Q. Now, just tell us what you mean by reversible coats.

A. A coat made to wear either side, silk or alpaca; made to wear either side out, with this strip and stay. (Witness indicates the strip and stay in the opening in the back of the coat.)

14 Q. State what you mean by coats made with silk or alpaca—that is, whether the coats had silk on one side and alpaca on the other.

A. Rubber on one side and silk on the other.

15 Q. And where was the alpaca?

A. On one side, and rubber on the other side.

16 Q. Was the silk and alpaca and the rubber on the same coat?

A. No; silk and rubber; alpaca and rubber.

17 Q. So that these reversible coats were made with one rubber side and with the other side covered with silk or alpaca, as the case might be.

228 A. They were.

18 Q. What were these reversible coats made for?

A. To wear either side out.

19 Q. And how was the front of these reversible coats made so that the coat could be worn either side out?

A. Made with an opening in the front.

20 Q. And how were the button-holes and buttons arranged on those reversible coats in the front opening?

A. Buttons on both sides of one front. Button-holes were arranged so that you could button this side and also button on this side. (Witness explains with Def'ts' Ex. Ferguson No. 1, Dec. 21, 1886.) We button this on the button on the rubber side of the coat, and if this was a button at the back of the button on front we would button on the other side of the coat.

21 Q. Is this coat, Ex. Ferguson No. 1, what you have called a reversible coat?

A. No; this is not a reversible coat.

22 Q. How long have you known coats that were not reversible like Ex. Ferguson No. 1 and that were made with a loose button-hole strip and stay in the back opening of the coat, as is shown in the Ex. Ferguson No. 1?

Objected to as leading.

A. Continually since 1864.

Cross-examined by Mr. JENNER:

23 X Q. What time in 1864 did you go to work for the glove Co?

A. November 6, 1864.

24 X Q. Before that what had you been doing?

A. Keeping house.

25 X Q. Did you remain continuously in the employ of the glove Co. from 1864 down to two years ago?

A. I did.

229 26 X Q. Did you do any work on any other rubber goods besides coats in 1864 and 1865?

A. My business was making coats.

27 X Q. Question repeated.

A. My business was coat-making—making coats.

28 X Q. That does not answer the question, madam; please answer it.

A. I did not.

29 X Q. State everything which you had to do with the making of coats in 1864 and 1865.

A. Cementing the seams; putting together the coat.

30 X Q. How many different constructions of coats were made by the glove Co. during those two years?

A. By constructions do you mean the back of the coat?

31 X Q. I mean any difference in construction which would make a different style or require different patterns. I do not mean different sizes, color of the rubber surface, or material of the lining.

A. I didn't make any different one from this. (Witness points to Def'ts' Ex. Ferguson No. 1.)

32 X Q. Were any different ones made by the Co. during those years—that is, 1864 and 1865?

A. I think not.

33 X Q. How many persons worked in the room where you did in those years?

A. From 30 to 50.

34 X Q. Who of them worked on coats in those years?

A. Do you mean all?

35 X Q. I mean all who worked on coats.

A. All of them.

36 X Q. What did they do?

A. Made coats.

37 X Q. What part of the work did they do?

A. Cemented seams and put together coats.

38 X Q. Was the cutting out done in that room?

A. It was not.

230 39 X Q. What was the daily product of those coats in those years on an average?

A. From one hundred to two hundred.

40 X Q. Did they have any stock name or number in those years?

A. I think not.

41 X Q. Have they ever had any stock name or number that you know of?

A. I think not.

42 X Q. Were you paid by the piece or by the week?

A. By the piece?

43 X Q. Were you married in 1864?

A. I was.

44 X Q. Who in 1864 handed the work to you to be done?

A. Mr. C. N. Squires.

45 X Q. What was his position?

A. Cutter.

46 X Q. Was your work entered in a pass book when it was given to you?

A. I think it was.

47 X Q. Was it not charged under some number?

A. I think not.

48 X Q. Nor name?

A. Reversible coat or riding coat.

49 X Q. Where are those pass books?

A. I don't know.

50 X Q. When filled up I suppose they were handed to you and, not being of value, you destroyed them?

A. I think so.

51 X Q. How long did you continue to work on these coats?

A. Until ten years ago.

52 X Q. How do you fix that date?

A. I was hired by the week to instruct in making coats.

53 X Q. When you came to be paid by the week how much were you paid per week?

A. Ten dollars.

231 54 X Q. And did you continue that work of instruction down to the time that you left?

A. I did.

55 X Q. And did you do anything else?

A. I did not.

56 X Q. Referring now to the reversible coats of which you have spoken, how many sets of buttons did they have in front?

A. Two sets.

57 X Q. One inside and one out?

A. Yes.

58 X Q. How many sets of button-holes in front? Please answer without looking at the Exhibit Ferguson No. 1, which you have in your hand.

A. One.

59 X Q. How many buttons made up a set?

A. Twelve on a reversible coat.

60 X Q. And of these 12 buttons were six inside and six outside?

A. Yes.

61 X Q. Were the six inside buttons on the opposite side of the combined fabric to that of the outside buttons?

A. I don't fully understand that question.

62 X Q. Were the 12 buttons on the same side of the front opening?

A. They were.

63 X Q. Then the six inside ones were behind the 6 outside ones, on the opposite side of the fabric. Is that correct?

A. One button was opposite the other.

64 X Q. How many button-holes were there in the front opening?

A. On those coats I think there was six.

65 X Q. Why did you take so long to answer the question?
A. Thinking.
66 X Q. Trying to think how many there was?
A. Yes.
67 X Q. The six button-holes were all on one side, were they not?
232 A. Yes.
68 X Q. And those front button-holes, were they in the main body of the coat or were they in a fly piece, as are the button-holes in Ex. Ferguson No. 1, which you have in your hands?
A. They were on the coat.
69 X Q. Well, was there a fly piece for buttoning the front opening, as in Exhibit Ferguson No. 1?
A. The same—there was.
70 X Q. I have meant by fly piece in Ferguson No. 1 the under piece which has the button-holes. Have you meant the same thing by "fly piece" in answering the prior questions?
A. On the reversible coat, not the fly.
71 X Q. What do you mean by fly? Point out on Ferguson Exhibit No. 1.
A. This piece. (The witness points out the under piece in the front of the coat containing the button-holes.)
72 X Q. Then you meant by your answer prior to the last one that in the reversible coat the button-holes were in the coat part and not in the fly piece; is that correct?
A. Yes; it is.
73 X Q. In the reversible coat which was the outside—the rubber surface or the silk or the alpaca?
A. It might be worn either side—to be worn either side.
74 X Q. Let us call the rubber-surface side the outside for the present. Now, on which side was the fly piece of the front opening—on the outside—that is, the rubber side or the inside—that is, the silk or lining side.
A. On the left side of a reversible coat—both inside and out.
75 X Q. Then were there two fly pieces?
A. I think there was.
76 X Q. Are you sure of it?
A. I am.
233 77 X Q. And they were both on the same side of the front opening?
A. Yes.
78 X Q. Was there any change made in the construction of the reversible coat while you worked upon them or gave instructions to others how to make them?
A. Not in making the flys.
79 X Q. Was there in any other respect?
A. I think not.
80 X Q. Please observe the buttons on Exhibit Ferguson No. 1. You used the same kind of buttons when you first worked on reversible coats?
A. Did not.

81 X Q. What kind of buttons did you use first?

A. Cloth buttons, sewed on.

82 X Q. When did you first use such buttons as are on the Exhibit Ferguson No. 1?

A. I can't tell the exact time.

83 X Q. State it as near as you can.

A. For ten years.

84 X Q. Do you mean for ten years from now or ten years from the time before which you left?

A. From now.

85 X Q. Were gloves and air cushions made in the same room where you were?

A. They were not.

Redirect:

86 Re-D. Q. In your answer to cross-question 72 you state that "the button-holes were in the coat part and not in the fly piece," when asked concerning the front of the reversible coat you have been talking about. State now where the button-holes were in the back opening or skirt of these coats, whether those button-holes were in the fly piece or in the body of the coat.

Object- to as not in rebuttal.

A. In the fly.

234 87 Re-D. Q. And where were the buttons fixed in the skirt opening of these reversible coats?

Same objection.

A. On the coat.

88 Re-D. Q. In cross-question 32 you were asked "Were any different ones (referring to coats like Def'ts' Ex. Ferguson No. 1) made by the company during the years 1864 and 1865," and you answer, "I think not." Do you mean by this answer that the company during two years only made coats like Ex. Ferguson No. 1, or that you made only such coats in that time?

Object- to as grossly leading, and that there is no ambiguity about the question or answer.

A. I made only such coats.

89 Re-D. Q. When you said, in referring to the reversible coats, "that twelve buttons made a set," did you understand that question to refer to the buttons on the front of such coat only, or did you understand it to include also the buttons in the back opening in the skirt of the coat?

Same objection.

A. On the front only.

Recross:

90 Re-X Q. How many kinds of coats were made by the company in 1864 and 1865?

A. Five.

91 Re-X Q. What kind were they?

A. Reversible, not reversible, mountaineer coats, horseback riding, like this, Ex. Ferguson No. 1, and sacks.

92 X Q. Did you do any work on sacks?

A. I think not.

93 X Q. On the mountaineer?

A. I did.

94 X Q. On the horseback?

A. I did.

235 95 X Q. On the reversible?

A. I did.

JANE WARD.

Sworn to Dec. 29th by Mr. Griffith.

Recess taken till 2 o'clock.

2 O'CLOCK P. M.

Examination of witnesses resumed.

SAMANTHA BENHAM, being produced and duly sworn as a witness on behalf of defendants, testifies as follows:

1 Q. What is your name, age, residence, and occupation?

A. Samantha Benham; age, 57; reside at Straitsville, Connecticut. I am keeping house.

2 Q. Were you ever employed by the Goodyear India Rubber Glove M'f'g Co.?

A. I was.

3 Q. State when for the first time and how long.

A. I went there in 1863, the middle of March. I left there two years ago.

4 Q. State what your particular occupation was during your employment by this company.

A. Making coats and all kinds of garments.

5 Q. And by making coats what do you mean?

A. Putting them together—cementing the seams and putting them together.

6 Q. And can you state approximately what the different kinds of coats were you worked on?

A. I worked on reversible coats, mountaineer coats, firemen's coats, sack coats.

7 Q. How about horseback coats, did you have anything to do with them?

A. I did.

8 Q. Do you know anything about reversible coats?

A. I made them.

236 9 Q. And do you know anything about coats having an opening in the back and having a loose button-hole strip and stay?

Objected to as leading.

A. I do.

10 Q. Did you work on such coats?

Same objection.

A. I did.

11 Q. How did such coats, in their construction of the back opening, button-hole strip, and stay, compare in those particulars with the coat which I now hand you, marked Defendants' Exhibit Ferguson No. 1?

Objection continued.

A. They were made exactly as that is. I made them.

12 Q. When did you first make such coats with such button-holes, strips, and stays in the back openings?

Same objection.

A. I made them very soon after I went there. I think in the first year.

13 Q. Can you say positively that it was either in the first or second year that you went to the company, as stated?

Same objection.

A. I can—the first year, I think.

14 Q. How long did you continue to work on coats with back openings and loose button-hole strips and stays constructed as you have described?

A. Occasionally, as long as I worked there.

15 Q. State if you know whether other employees of the company worked on the same kind of coats.

A. They did, I think.

16 Q. Are you a sister of Mrs. Jane Ward, the previous witness?

A. I am.

237 17 Q. Did you work in the same room and near Mrs. Ward?

A. I did.

18 Q. Did you ever see your sister working the coats you have described, and instructing others to make them?

A. I have. She instructed me.

19 Q. Did you live with your sister?

A. I did not. I lived near her.

Cross-examined:

20 X Q. Were you here in the room while Mrs. Ward, your sister, was testifying, and did you hear her testifying?

A. I did.

21 X Q. Did you do any work on these coats before your sister instructed you?

A. I did. My sister did not instruct me on this part (witness points to the fly on the back of coat). I was learned this part before she was in the shop.

22 X Q. Has it just occurred to you that your sister testified that she went there to work in November, 1864?

A. It has not. I knew what I was saying.

23 X Q. Then why did you say that your sister instructed you how to make those coats?

A. She instructed me in some parts of the coat that I did not understand, but not that part.

24 X Q. Then all you did in 1863 was to work on the back opening of these coats, do you wish to be understood?

A. I do not.

25 X Q. Well, what part of the coat did you work on in the year 1863?

A. I made the coat throughout. There was some little changes in putting on the collar—the make of the collar—that she instructed me; the collar was in one whole piece at first, and they made in two parts and put it together.

26 X Q. When was that change made?

238 A. In 1864, I think.

27 X Q. What part of the year?

A. I couldn't say that. I couldn't remember that.

28 X Q. Then it was at the time that change was made that your sister gave you the instructions; is that correct?

A. It is.

29 X Q. Had your sister ever worked on rubber goods before going to the glove Co. in 1864?

A. She had.

30 X Q. Where?

A. The Union Co.

31 X Q. At what place?

A. At Naugatuck.

32 X Q. During what period?

A. I couldn't say; before the Union Co.'s factory was burned. I couldn't say what years.

33 X Q. State it as near as you remember.

A. I don't remember the year the factory was burned. I couldn't say.

34 X Q. Give as near to it as you can.

Objected to as answered, asking for information as to things of which the witness has no knowledge.

A. I don't want to say, for I cannot remember.

35 X Q. How many years did your sister work for the Union Co.?

A. I could not tell.

36 X Q. Five years?

A. I couldn't say.

37 X Q. Ten years?

A. She might; I don't know.

38 X Q. Did she work ten years for the Union Co.?

A. I don't know.

39 X Q. Did she work one year?

A. She did.

40 X Q. How much longer than one year?

A. I don't know.

239 41 X Q. Did you know at the time, but have forgotten since?

A. I don't think I ever thought how many years she worked there.

42 X Q. You knew when she went there and when she left, didn't you?

A. I knew at that time, but don't remember now.

43 X Q. And you can't tell, can you, within five years when she went to the Union Company and when she left it?

A. I cannot.

44 X Q. Can you tell within ten years?

A. I think not.

45 X Q. Did you work in the same room with your sister for the globe company in years 1863 and 1864 while your sister, Mrs. Ward, was there?

A. I did.

46 X Q. State all the kinds of work that was done in that room in those years.

A. I don't think I could.

47 X Q. Why can't you?

A. They made all kinds of clothing—that is, as far as I can say.

48 X Q. How many persons worked in that room during those years?

A. I should think from twenty to fifty.

49 X Q. All doing the same kind of work?

A. All working on clothing.

50 X Q. Was any other work than cementing done in that room in those years, 1864 and 1865?

A. Cementing and making and putting together garments.

51 X Q. Anything else?

A. I think not.

52 X Q. Were you, in those years, paid by the piece or by the week?

A. By the piece.

53 X Q. What other kinds of garments did the glove company make in those years, 1864 and 1865, besides coats?

240 A. Everything that they had orders for, I suppose.

54 X Q. Was your name the same in 1863 as it is now?

A. It was not. My name then was Hotchkiss.

55 X Q. Won't you describe more fully the change which was made in the collar?

A. I can't tell you any different from what I have told you.

56 X Q. I don't think the court would get a very clear idea of the change from what you have said about it. Won't you please describe again the change in the collar?

A. The collar was one piece like that (illustrating with a pocket handkerchief), square corners. Now, they changed it and made two parts of it and cemented as that is now and in that shape.

Witness here refers to the collar on Defendants' Exhibit Ferguson No. 1.

57 X Q. The collar on the Exhibit Ferguson No. 1 is made of how many pieces?

A. Two.

58 X Q. That is, the two rubber surfaces?

A. Yes; made like that; the two rubber surfaces outside as that is now.

59 X Q. And before the change there was but one rubber surface. Is that correct?

A. It is not.

60 X Q. Were there two rubber surfaces before the change?

A. There was. It was one whole piece doubled there (indicating the top edge of collar). It was rubber both sides.

61 X Q. Then before the change the collar was made by folding over a single piece of goods, the top edge of the collar being made by the fold, and the change was to make the collar out of two pieces, the top edge of the collar being formed by turning in the edges of each piece and cementing them. Does that state the change correctly?

A. It does.

241 62 X Q. Do you testify positively that that change in the collar was made in 1864?

A. I think it was.

63 X Q. Are you positive about it?

A. I think I am.

64 X Q. Are you positive?

A. I think I am.

65 X Q. That is as far as you will go, is it?

A. I was showed to make them at that time that way.

66 X Q. How much were you paid for making the coats like the coat Exhibit Ferguson No. 1 in 1863?

A. There has been different prices for the coats. I don't think I remember.

67 X Q. Can you remember the price at any time?

A. I think that there has been a time when they were 20 cents apiece. I don't remember when.

68 X Q. How long a period was it that you were paid 20 cents apiece?

A. I don't remember.

69 X Q. Can you state within a year?

A. I cannot.

70 X Q. Within 3 years?

A. I cannot.

71 X Q. Within 5 years?

A. I don't remember.

72 X Q. Can you state what year it was that you were paid 20c. apiece for making such coats?

A. I cannot.

73 X Q. Can you state within five years?

A. I cannot.

74 X Q. How many such coats were made per day, as an average, in 1863?

A. Five and six, I should say.
75 X Q. How many in 1864?
A. Probably the same.
76 X Q. How in 1865?
A. I couldn't say.
77 X Q. Was it about the same?
A. Don't know.
242 78 X Q. You have some impression, have you not?
A. I have not.
79 X Q. Why is it that you are able to state the approximate average for 1863 and 1864 and have no impression as to the daily average for the year 1865?
A. I don't think that any one could make any more than that.
80 X Q. Were you testifying as to 1863 and 1864 with respect to what you made or as to what was made in the factory?

Counsel for def'ts requests that the testimony referred to by compl't's counsel be read to the witness before she gives an answer.
Compl't objects to anything being read to the witness.
Def'ts' counsel instructs the witness that she has the right to ask that the testimony referred to in the last question be read to her if she does not remember it.
Compl't's counsel instructs the witness that she has no such right, but that she may correct her disposition at the end if she sees fit.

A. What was made in factory?
81 X Q. How many such coats were made in 1866 in the factory as a daily average?
A. One person could not make more than five or six—they couldn't.
82 X Q. Well, how many were made as a daily average in the factory in 1866?
A. I could not tell.
83 X Q. Have you any impression?
A. I don't know how many were working on them.
84 X Q. How many were made in 1884 as a daily average?
A. I don't know.
243 85 X Q. Have you any impression?
A. I have not, in 1884?
86 X Q. Were you working on such coats in 1884?
A. I don't remember.
87 X Q. Were you in 1883?
A. I might have been. I couldn't say positively.
88 X Q. Were you in 1882?
A. Couldn't say.
89 X Q. Can you say with respect to 1881 or 1880?
A. I should think likely I might have been. I made them whenever I was called on.
90 X Q. What was there about the change of the collar that made instruction needful to you?
A. The cementing and hemming it and putting it together.

91 X Q. The hemming was the ordinary hemming in rubber goods, was it not?

A. Some pieces were hemmed wide and some pieces were hemmed narrow.

92 X Q. The cementing was the ordinary kind of cementing, was it not?

A. It was not cemented as wide as the common seams.

93 X Q. Then the instructions given you by your sister consisted in telling you to make narrower seams. Is that so?

A. It is.

94 X Q. And you are quite sure that took place in 1864?

A. I am.

95 X Q. Did the goods which the glove company made at that time have any stock or book numbers or names?

A. I think not.

96 X Q. Are you sure about that?

A. What do you mean?

97 X Q. What did you mean when you answered my previous questions? I meant the same thing.

A. I meant just what I said, and I didn't mean anything else.

244 98 X Q. How were the goods designated in your pass books—by names or by numbers?

A. So many coats or garments.

99 X Q. Which was it—coats or garments?

A. Whatever it was; so many coats or garments, whichever we had.

100 X Q. Were all coats paid alike?

A. They were not.

101 X Q. When coats were given to you to make like the Exhibit Furguson No. 1 under what name were they entered in your pass book?

A. So many coats with fly pieces in the back.

102 X Q. And that method of entering them in the pass book continued down to the time you left, did it not?

A. That was the way they were given to me. I couldn't say about others.

103 X Q. Down to the time you left?

A. It was.

MRS. SAMANTHA BENHAM.

Sworn Dec. 29th by Mr. Griffith.

Adjourned to Friday, Dec. 31st inst., at 11 a. m., same place.

NEW YORK, *Dec.* 31*st*, 1886.

Met pursuant to adjournment.
Present: Counsel for the respective parties.
Adjourned to January 3, 1887, at 11 a. m.

NEW YORK, *Jan'y* 3, 1887.

Met pursuant to adjournment.
Adjourned to January 7th, 1887, at 11 a. m., at same place.

245 NEW YORK, *Jan'y 7th*, 1887—11 a. m.

Met pursuant to adjournment.

Recess taken until 12 m.

Met pursuant to adjournment at 12 m.

Present: Counsel for defendants; Mr. Gibbons on behalf of complainant.

The direct examination of the witness, Mr. JOHN E. EARLE, continued:

13 Q. Look at these three exhibits, "marked respectively Defendants' Exhibits Short-tail Rubber Coat, November 1st, '86; Defendants' Exhibit Long-tail Rubber Coat, November 1, '86, and Defendants' Exhibit Ferguson No. 1, December 21, '86," and state whether you find the openings in the skirt of the several exhibits reinforced or stayed, giving the construction and arrangement of the stays, the effect produced by the stay as you find it, and your reasons for any opinion you may express regarding the matters enquired about.

A. I find in each of these coats the skirts constructed open in the back from the bottom upward, one side of the opening overlapping the opposite side in like manner as do the parts of fly-front pantaloons.

Referring first to Defendants' Exhibit "Short-tail Rubber Coat," I find the two sides of the opening joined one over the other, forming what may be called the apex or crotch. The two parts at the crotch are secured together in the usual manner of joints or seams in India-rubber goods (the three coats are made of India-rubber fabrics). Were there no other provision at the apex than this common seam or joint any strain applied to the two sides in opposite directions would be resisted only by the seam. To take this strain from the seam and bring it directly upon the two sides a stay piece is introduced, secured to one side, distant from the crotch and
246 clear to the crotch; thence on the opposite side, where it is also secured, the security being from one side to the crotch; thence on to the opposite side, so that any strain upon the two sides in opposite directions, which would be otherwise resisted by the seam or joint securing the two sides together, is now taken by this stay piece, and so long as this stay piece holds no strain can come upon the seam which connects the two sides.

Referring now to Defendants' Exhibit Long-tail Rubber Coat, I find the skirt at the back has the same slit as in the first exhibit and with a similar overlap, but instead of applying an independent stay piece at the crotch, as in the first exhibit, there is an extension from the inner flap or side across the crotch and out to the opposite side, and this is reinforced by a strip of lining upon the inner side of the outer flap extending from the extreme free end of the flap to the crotch, thence on to the opposite side. This lining strip is secured throughout its length and clear into the crotch and so that all strain brought upon the crotch must be resisted by these strips extending across the crotch and so that no strain can come upon the intersec-

tion of the two sides beyond these overlapping stays. In this last-mentioned exhibit, "Long-tail Rubber Coat," a button is secured to the underlying flap and a corresponding button-hole through the overlying flap, the purpose of which is to temporarily close the opening, and a similar provision for closing the opening is made in the Exhibit "Short-tail Rubber Coat."

In the third exhibit, viz., "Ferguson No. 1," there is substantially the same overlapping of the sides and opening in the skirts. The inner side or flap of the opening in this coat is provided with two buttons, and the opposite side is provided with a button-hole strip upon its inside. This button-hole strip is provided with button-holes corresponding with the buttons upon the opposite side;
247 it extends from the free end of the flap to the crotch, and thence on to the opposite side; it is firmly secured to the parts of the crotch, the securing extending from the crotch on to both flaps and so that the button-hole strip forms a stay across the crotch to take the entire strain which may be brought upon the two parts at the crotch and entirely relieve the seam or joint between the two flaps at the crotch.

In the three exhibits to which I have referred the crotch-staying pieces are secured to the respective sides in the usual manner of making seams or joints in India-rubber goods.

14 Q. So far as the staying is concerned at the apex or crotch, as you call it, state whether you find in any of the three exhibit coats last referred to any material difference.

A. No, sir; I do not. It is true in the Exhibit Ferguson No. 1 the inner portion of the outer flap, which extends across the crotch on to the opposite side, forms also the button-hole strip, whereas in the other two exhibits the button-holes extend entirely through the overlapping flap, but the staying of the crotch is produced by securing the stay onto both sides and clear into the crotch, and in this Exhibit Ferguson No. 1, were the button-hole strip secured to the flap so as to become a lining and the button-holes cut entirely through, as in Defendants' Exhibit Long-tail Coat, the stay would be precisely the same as it now is. Again, were the button-hole strip cut off at the point where it is secured to the outer flap, near the crotch, and entirely removed, that portion which remains at the crotch would still form the stay at the crotch and precisely the same as it does now and as in the other two exhibits. In either case the stay across the crotch, while it permits the opening or spread of the two sides clear to the crotch, the stay must resist the entire strain between the two sides at the crotch.

15 Q. Look at Ex. Def'ts' Long-tail Coat and state whether
248 you find in the opening at the back to which you have referred a button-hole strip independent of the lining of the coat extending from the bottom of the skirt of the coat to and across the apex or crotch of the opening.

A. There is upon the inside of this button-hole side or flap a strip of fabric extending from the lower end of the skirt up close into the crotch, thence down upon the opposite side. This strip is secured to

the flaps throughout its entire extent, and the button-hole is made through this strip and through the flap itself.

16 Q. State whether you find in Exhibit Long-tail Coat that the button-hole strip you have last referred to and the stay are integral.

A. It is; and the additional stay across crotch from the other side is also integral.

17 Q. Now, suppose the button-hole strip referred to in "Exhibit Long-tail Coat" was only secured to the coat at intervals between the button-holes and continuously along the inner edge of the strip, so that the heads of the buttons would lie between the strip and the inner surface of the flap, what difference, in your opinion, would there then be between the Exhibit Long-tail Coat and the Exhibit Ferguson No. 1?

A. Assuming that in the case supposed the button-holes are made entirely in the button-hole strip, the construction would be substantially the same; in fact the supposed construction is represented in the coat "Ex. Ferguson No. 1."

18 Q. Then do you say that the only differences in the button-hole strip of the Long-tail Exhibit and the button-hole strip of the Ferguson exhibit are, in the one case, the buttons of the opening protrude through the button-hole strips and the outer surface of the coat, and that the strip in one exhibit is fastened to the garment continuously throughout its length, and the strip on the other garment is fastened continuously on one edge and at intervals on the other edge?

249 A. Assuming that in Ex. Long-tail Coat the button-hole strip is the inner thickness of the outer flap and which extends across the crotch to form the stay is the button-hole strip, then the differences referred to in the question constitute the differences in the construction of the flaps of the two garments.

19 Q. Now, what has these differences, in your opinion, to do with the stays or strengthening or reinforcing of the apex or crotch of the opening in the skirts of the two coats referred to?

A. Nothing whatever. The stay is precisely the same in both as to construction and result.

20 Q. I believe you have stated, but kindly state again, whether in the three exhibit coats, "long tail," "short tail," and "Ferguson," you find the stays in each of them secured close down into the apex or crotch in each instance.

A. I do.

21 Q. State whether you find in any of the exhibit coats last referred to a stay piece, which is a bridge united at two points only to the opening without intermediate points of attachment.

A. Understanding a bridge to be the stay attached so as to span the crotch and leave the crotch free and open, there is no such bridge or stay in either of these exhibit coats.

22 Q. Referring to the three exhibit coats again, do you find any such bridge — stay as is described and shown in Gibbons' original patent No. 178,287, Def'ts' Ex. F?

A. No, sir; understanding the stay of that patent to be a bridge "which does not extend down and fasten into the crotch, * as in the common construction of pantaloons, but bridges over the crotch,

being securely stitched" to opposite sides and so as to leave an open space between the bridge and crotch when strain is brought between the two sides and bridge, there is no such bridge or stay in either of three exhibit coats.

23 Q. Refer to the overalls, Defendants' Exhibit E, March 30, '86, and which are identified by Mr. Renwick as duplicates in
250 construction of the overalls of the defendant introduced by the complainant in his *prima facie* proofs, and state whether you find in that exhibit the stay or reinforcing of the crotch is immediately at and in close contact with the crotch, and, in fact, forming in part the crotch itself.

A. I do.

Recess taken until 2.40 p. m.

24 Q. State whether, in your opinion, the reinforcing or strengthening of the skirt openings in Exhibits Long-tail, Short-tail, and Ferguson Coats strengthen the apex or crotch in the same manner or in substantially the same manner as does the reinforcement in the crotch of defendants' overalls, Defendants' Exhibit E.

A. It is substantially in Exhibit E as in the coats referred to, differing only so far as the nature of the material is concerned, and no further.

25 Q. State whether it is, within your knowledge, so far as the state of the art is concerned, common and necessary to strengthen garments, such as pantaloons, coats, and other things, at the crotch or other angular openings of crotch-like form.

A. It is a common and in many cases a necessary practice to introduce a stay piece at the junction of two parts seamed together, and so that the said stay piece will take the strain from the connecting seam or joint between the parts at the apex.

26 Q. State as to the antiquity of this common and necessary staying, as far as you know.

A. It dates back of my remembrance.

27 Q. State, if you can, whether the overalls, Defendants' Exhibit Rubber Overalls, Nov. 1, '86, shows one old and common method of strengthening garments at the crotch.

A. It does, the stay consisting in a piece applied at the junction of the leg seams and so as to overlap the cross seams, and by its connection with the adjacent part relieves the crotch seams from
251 the strain which would otherwise be brought upon them.

28 Q. If you can, please state as to the antiquity of fly fronts having a button-hole strip, such as is shown in Ferguson Ex. No. 1.

A. To the best of my recollection the fly-front opening came into use in this country about 1843. At first the button-*whole* strips were stitched to the front at its outer edge throughout its whole length; later, probably within five years, the close stitching of the outer edge was omitted and the button-hole strip secured at the outer edge only at points between the button-holes, as in the Ferguson Exhibit Coat.

29 Q. Look at these exhibits of the defendant which are marked

respectively Defendants' Ex. Chair Air Cushion, Nov. 1, 1886; Water Bottle, Nov. 1, 1886; Def'ts' Ex. D, Oct. 29, 1886; Def'ts' Ex. E, Oct. 29, 1886; Def'ts' Ex. Williams No. 1, Nov. 27, 1886; Def'ts' Ex. A, Oct. 29, 1886; Def'ts' Ex. B, Oct. 29, 1886, and state with particularity whether you find reinforced seams, angular or otherwise, and as to the construction and operation of such reinforced seams, giving your reasons for any opinion you may state.

A. Referring to Def'ts' Ex. Air Cushion, this is of bag-like character, designed to be inflated, and in order that the cushion when inflated may retain a flat or cushion-like shape the two sides of the bag are connected by webs, and these webs are formed by the lining of the bag; the lining is made in sections doubled and secured to the opposite sides of the bag, but so as to leave the lining or doubled portion disconnected for a short distance from the fold in the lining, and so that as the two parts separate in inflating the said folded portion of the lining straightens and forms a stay to limit the spread of the two parts. This stay is made integral with the lining.

Exhibit Water Bottle is made from India-rubber fabric.
252 The two sides join at the edge by a common rubber seam, and on the inside a stay is applied at the seams, which laps on to the two sides across the seam and so as to relieve the seam from any strain arising from the expansion of the bottle. The stay of the seam of this exhibit is substantially the same as that in Exhibit Short-tail Coat, and produces in the bag the same result as does the stay in either of the three exhibit coats.

Ex. D is a pair of India-rubber gloves having the apex or crotch between the several fingers and between the thumb and the body of the glove reinforced by an overlapping stay piece to strengthen the seams at those points, substantially like Def'ts' Ex. Rubber Overalls.

Def'ts' Ex. E is another pair of India-rubber gloves with the crotches stayed by an overlapping piece, as in the last-mentioned Ex. D.

Def'ts' Ex. Williams No. 1 is a pair of India-rubber overalls having the crotch stayed by an overlapping piece, substantially the same as Def'ts' Ex. Rubber Overalls.

Def'ts' Ex. A, as I understand it, is a section of a cushion such as Def'ts' Ex. Air Cushion and illustrates the integral character of the two sides and the connection between them. The lining extends along one side to the apex of fold, thence returning to the other side.

Def'ts' Ex. B is, as I understand it, a section from a similar cushion showing the stay or tie at a point nearer the edge of the cushion than does Ex. A.

In all these exhibits there is the same integral character of the stay piece between the connected sides, and so that the said stay piece takes the strain, or its part of it, which would otherwise be wholly torn by the seams or joints connecting the parts.

36 Q. Now can you say, Mr. Earle, as an expert in such matters, in your opinion the several exhibits, including all that have been before you to-day, illustrate examples, in many instances differ-

ent methods of staying seams, so that the seams may be
253 strengthened and be enabled to bear undue strain?

A. I can and do so state.

31 Q. And is it within your knowledge that seams and joints, angular or otherwise, in textile fabrics and other substances, have been stayed, reinforced, or strengthened by numerous other methods besides those shown in the exhibits referred to? If you answer yes, state how long you have known such other and various means of staying.

A. I do know of the common use of various kinds of stays for the crotch or apex of seams or joints, such, for illustration, as what is commonly called a "gusset," extra stitching, eyelets introduced through the parts at the apex, rivets introduced at the same point; also clips. These I have known many years; cannot say how long, but certainly before the filing of the application for the patent in suit, and some of them many years prior to that time.

Adjourned to Saturday, Jan. 8, at 10 a. m.

NEW YORK, *Jan'y* 8, '87—10 a. m.

Met pursuant to adjournment.

Present: Mr. Plympton, for def't; Mr. Gibbons, on behalf of compl't.

Examination of the witness, JOHN E. EARLE, Esq., continued:

32 Q. Again consider the reinforcements or stays in Exhibits "Long Tail," "Short Tail," and "Ferguson No. 1" Coats, and state whether you find the stay or reinforcement therein the same or substantially the same as in the stay that is shown and described in Gibbons reissue patent of March 22, '81, No. 9616, on which this suit is brought.

254 A. Understanding the invention described and claimed in the said reissue patent to be a stay between the two sides of the front opening in the pantaloons, attached to the two sides at points above the apex or crotch, and so as to form a bridge over said apex or crotch and so as to leave a clear space between the crotch and the bridge, the two sides of the opening below the bridge and to the crotch being of greater length than the bridge, and that strain between the two sides is resisted by the bridge stay at points distant from the apex or crotch and independent of the crotch, I do not find such a stay in either of the three exhibit coats referred to in the question.

But if the second claim of the reissue patent is to be construed so broadly as to include the stay between the two sides at the front when the stay extends down and is fastened into the crotch and so as to unite the two sides directly at the crotch, thereby omitting the bridge-like character of the stay, then I do not find such a stay in each of the three exhibit coats.

I do not understand that the extension of the button-hole strip, so as to form the stay as an integral part of the button-hole strip, is an essential feature of invention, for the reason that the same bridge-

like stay is illustrated and described in the reissued patent made in a piece separate from and not integral with the button-hole strip.

In the Ferguson No. 1 coat, however, there is the same integral character of the button-hole strip and stay as that described and illustrated in both the original and reissued Gibbons patents.

33 Q. Please consider the description and drawings of the bridge stay as in Gibbons' original patent No. 178,287 and as in the reissue thereof, No. 9616, dated March 22, 1881, and state what importance, so far as the alleged invention is concerned, is given in said patents to making the stay and button-hole strip integral or of one and the same piece.

A. I have examined the two patents, original and reissue,
255 and do not find in either an indication of any importance or advantage in making the button-hole strip and stay in one and the same piece, but, on the contrary, the original patent as well as the reissue both state that the bridge stay may be made of a separate piece of material, and there is no indication in either patent that a separate stay does not possess all the advantages, as a stay, with the integral stay.

The reissued patent distinctly states, in speaking of the crotch and in comparing the two stays, that the crotch "is relieved of all strain when the fly is pulled open by the piece c^2, arranged as shown." The piece c^2 is the bridge stay made separate from the button-hole strip.

34 Q. Inasmuch — the bridge stay in both the original and reissue patents is clearly shown as sewed through the button-hole strip and the adjacent sides of the opening in the garment at the points *e f*, what possible difference does it make or can it make whether the stay and button-hole strip are made in one and the same piece of cloth or not?

A. None whatever. If, for illustration, the button-hole strip of figure 1 of either original or reissue be cut off at the point *f* the stay will remain precisely the same and possess every advantage as a stay as it did before the strip and stay was separated.

Recess taken till 12 m.

Met pursuant to recess.

The complainants stating that they are not now ready to cross-examine the witness, John E. Earle, notice is hereby given that Mr. Earle will be present at this office on Thursday, the 13th inst., at 10 a. m., for cross-examination and requests an adjournment to that day.

JOHN E. EARLE.

Adjournment taken to Thursday, January 13th, at 10 a. m.

256 THURSDAY, *Jan. 13th*, 1887—10 a. m.

Adjourned, by request of complainant's counsel, to Jan. 19th at 11 a. m.

NEW YORK, *January* 19, 1887—11 o'clock a. m.

Present: G. M. Plympton, Esq., counsel for def't; Causten Browne, Esq., counsel for compl't.

Cross-examination of the witness, JOHN E. EARLE, by counsel for compl't:

35 X Q. Will you look at the article now shown you, being the fly portion of a pair of overalls, and state whether the construction of the parts constituting the opening at the front is what is referred to in the patent in suit as being and understood by you to be the common construction of overalls or pantaloons in use before the compl't's original patent?

A. It is, as I understand it.

37 X Q. In this article is the button-hole strip extended down into and sewed with the crotch seam?

A. It is extended down between the two sides of the fly and is secured by a seam through both thicknesses and through the button-hole strip.

Article referred to put in evidence and marked Compl't's Exhibit Old Construction, J. A. S., ex'r.

37 X Q. Will you look at the article now shown you, being the fly portion of a pair of overalls, and state whether the construction of the parts constituting the opening at the front is that described in the compl't's patent and shown in Fig. 1 of the drawings?

257 A. It is substantially the same, but the bridge in this exhibit is proportionately much shorter than that shown in Fig. 1 of the patent.

38 X Q. In this article you have just examined is the bridge or check piece made integral with the button-hole strip of the fly as specified in the second claim of the patent in suit?

A. It is.

Article referred to put in evidence and marked Compl't's Exhibit Gibbons Construction, Claim 2 (A), J. A. S., ex'r.

39 X Q. Will you look at the article now shown you, being the fly portion of a pair of overalls, and state whether it has a bridge or check piece made integral with the button-hole strip of the fly?

A. As far as appears to me, this article is substantially the same as the last exhibit, Complainant's Exhibit Gibbons Construction, Claim 2 (A), except that the connection between the button-hole strip and the two sides is made at points nearer the apex or junction of the two sides and so that the connection across the crotch has to a very considerable extent lost the bridge-like character of the previous exhibit, if not entirely, so that it can hardly be said of this exhibit that it is a bridge across the crotch, for when strain is brought on the two sides in this last article the connection lies flat upon the surface of the two sides, the distance between the two points of connection being equal to the combined length of the two sides below the points of connection, whereas in Exhibit Claim 2 (A) the length of the bridge, like the bridge in the illustration, Fig. 1 of the patent, is very

much shorter than the combined length of the two sides below the points where the bridge is connected.

40 X Q. But in the article last shown you, as in the Exhibit Gibbons Construction, Claim 2 A, there is, in combination with the fly portion of the overalls, a check piece made integral with the button-hole strip of the fly and adapted to prevent any tension of the
258 crotch that might operate injuriously upon it, substantially as described in the reissue patent in suit and as shown in Fig. 1. Is not that the truth?

A. Partly—yes, but not fully. As I understand the patent, the connection of what you call the check piece and what the second claim calls the check piece, an expression not found in the specification—if I recollect rightly, the connection of the stay or check piece with the two sides is made at points so far above the crotch that the check piece in doubling will not extend into the crotch—that is, it is shorter than the combined length of the two sides, and so that when the strain is brought upon the check there would necessarily be such a space under the bridge that no portion of the strain shall by any possibility be communicated to the crotch or the seam that connects the two sides.

In this article the free portion of the check piece between the two points of connection extends close down into the crotch, substantially as close as it would do were the seams securing the check piece continued down to the crotch; because of this difference I do not think it can be properly said to be the check piece described in the patent, for were the check piece stitched down into the crotch, as I have mentioned, it would not, in my opinion, be the check piece described in the patent.

I am aware that there is a point where it would be difficult to say whether the crotch was a bridge, as I understand the patent to require, or was not. But when the length of the check piece is the same as the combined length of the two sides between the points of connection, and so that for all practical purposes it extends down into the crotch and might as well be made fast at the crotch as left disconnected, then, as I understand it, it is not the stay or check piece of the patent.

41 X Q. On the whole, then, you answer my last question in the negative. Is that so?

A. For the reasons stated in my last answer I do.

259 42 X Q. If the check piece were the $\frac{1}{16}$ of an inch shorter would you answer that question in the affirmative?

A. If the bridge be so much shorter between the two points of connection than the length of the two sides below the said points as to leave the seam connecting the two sides at the crotch entirely free from strain, then I find the check piece or stay of the patent; just what extent of shortening of the check or stay piece would bring it to that condition and within the patent, as I understand it, I am not prepared to state.

Article last shown the witness put in evidence and marked Complainant's Exhibit Gibbons Construction, Claim 2 (B), J. A. S., ex'r.

43 X Q. Do you not think that with the construction shown in Gibbons' Construction, Claim 2 B, any extreme or sudden distension of the fly that would otherwise tend to rupture the crotch seam will come wholly upon the check piece, thus protecting the crotch seam from injury?

A. No, sir; but, on the contrary, the strain is borne partially by the check piece and partially by the seam, and this was apparent when first I strained said exhibit by a slight starting of the seam, so that, as it now stands, the strain is certainly borne by both check piece and seam, and this must always be the case where the check piece extends close down into the crotch, and will not be the case when the check piece does not extend down into the crotch. In the latter case it will be borne entirely by the check piece.

44 X Q. Are the reasons you have given for thinking that the check piece in Gibbons' Claim 2 (B) is not the check piece of the Gibbons patent also your reasons for thinking that the check piece of the defendants' overalls in this case is not the check piece of the complainant's patent?

A. The fact exists in defendants' overalls that the check
260 piece does extend clear down into the crotch and is secured clear down into the crotch, and does not in any sense take the strain upon the two sides distant from the crotch. The crotch in defendants' overalls is formed differently from either of the Gibbons Claim Exhibits or in the patent, and this construction necessitates the extension of the button-hole strip close down into the crotch and up on the other side, and it also necessitates making the crotch seam through the button-hole strip, and this crotch seam takes the strain.

45 X Q. If the button-hole strip in defendants' overalls stopped at the apex of the crotch and did not extend across the crotch, as it does in the sample of defendants' overalls which you now hold (Def'ts' Ex. E), what would happen if a strain sufficient to rupture the crotch were brought upon the overalls at that point?

A. I understand the crotch seam of a pair of fly-front pantaloons and as used in the patent is the seam always made in the fly-front pantaloons, which connects the two sides of the front and forms the crotch between the two sides, as seen in Complainant's Exhibit Old Construction and as clearly indicated in Fig. 3 of the patent, this being the seam which alone sustains the strain brought upon the two sides.

By the term crotch of the patent is not to be understood as used to express what is commonly called the crotch of the garment—that is, the point between the legs where the seams meet—but that it is the crotch in the fly itself, for the specification states, "My invention relates to means for strengthening the crotch in the fly of the pantaloons."

The crotch in the fly of defendants' overalls is of peculiar construction, as I have before stated, and is made by a seam, not through
261 both sides and the fly, as in Exhibit Old Construction and Exhibits Gibbons Claim 2 A and 2 B, but by a seam through the button side and through the button-hole strip only.

If by your question you mean were the button-hole strip cut off beyond this connecting seam, I should say that it would simply weaken the construction. If, however, your question means to cut off the button-hole strip below its point of connection with the button sides, I should say that such cutting would practically destroy the garment, as there would be no proper connection between the two sides at the crotch in the fly. The peculiar construction of defendants' overalls permits the omission of the usual crotch seam in the fly, but not only permits but forbids it, for if the usual fly-crotch seam was made in these overalls, Exhibit E, so as to take through both sides of the front at the crotch, then it would be practically the old construction.

46 X Q. Suppose my question to mean cut off the button-hole strip below its point of connection with the button side, which, you say, would leave the garment without any proper connection between the two sides at the crotch in the fly, if, now, a strain sufficient to rupture the crotch should be applied to that part of the garment, would not the crotch be ruptured?

A. No, sir; in your supposed construction you have cut the crotch in the fly, and there is nothing left to be ruptured. It might rip the seam of the garment below, precisely as it would do in the Ex. Old Construction, were the crotch seam of the fly removed or omitted.

47 X Q. What do you mean by the seam of the garment below? From what point to what point does it extend?

A. The seam I refer to is the one of the four seams connecting the garment at what is called the crotch of the garment, and it extends from the said crotch forward and upward to the crotch in the fly.

262 48 X Q. Is the letter *d* in the Fig. 1, Gibbons' patent, placed at the crotch of the garment and at the beginning of the seam which you say might be ruptured in the def'ts' overalls if the button-hole strip were cut where I assumed it to be cut?

A. No, sir; it is not. *d* indicates the crotch in the fly, and this ordinarily is some distance from the crotch of the garment, as will be seen by Ex. E, def'ts' manufacture, and as is also fairly illustrated in Compl't's Ex. Old Construction and Compl't's Ex. Claim 2 (A) and 2 (B).

Recess taken to 1.40 p. m.

49 X Q. I will amend my last question so that it will read thus: Is the letter *d* in Fig. 1 of the Gibbons patent in suit placed at the end of the seam which you say might be ruptured in defendants' overalls if the button-hole strip were cut where I assumed it to be cut?

A. It is at the crotch seam of the fly, and that seam is at the upper end of the seam which runs from the crotch between the legs upward to the crotch in the fly, and that is the seam which would be left without stay and is the seam which I referred to as liable to rip when the stay was removed.

50 X Q. I hand you now an article which is a portion of a pair of overalls made originally in all respects like Compl't's Exhibit Gib-

bons Construction, Claim 2 (A), but on which the opening below the check piece appearing in that ex. has been closed by stitching with blue thread. Will you examine it and state whether such closing up of said opening by the blue stitching has, in your opinion, made the check piece cease to be the check piece of the patent in suit and referred to in the second claim?

A. In this article the crotch seam and two points of connection of the fly are, as you correctly say, substantially the same as the Exhibit 2 A. The stay between its two points of connection, like that in said Exhibit 2 A, is very considerably shorter than the com-
263 bined length of the two sides between the crotch and the points of connection, and so that when strain is put upon the two sides it would draw the stay straight. The fly-crotch seam is as free from strain as in Exhibit 2 A, and the stay in that article prevents the strain upon the crotch seam to the same extent as it does in Exhibit 2 A. Simply closing the opening between the crotch and the stay without changing the relation of the crotch and stay does not make any material difference between this article and Exhibit 2 A. No result is accomplished that did not exist before the change was made. There is the same independence of the crotch seam from the stay as if the space were not closed.

51 X Q. If there should be a second transverse seam sewed across the thicknesses of material about $\frac{1}{8}$ of an inch above the transverse yellow seam now in the article, such second seam parallel with such transverse yellow seam, would your answer be the same or not?

A. No, sir; it would not. It would be the same as I have made with reference to Complainant's Exhibit Claim 2 B, for the reason that then it would be substantially like said exhibit.

The article last shown to witness put in evidence and marked Complainant's Exhibit Gibbons Construction, Claim 2 C., J. A. S., ex'r.

JOHN E. EARLE.

Sworn to before me—

JOHN A. SHIELDS, *Examiner.*

Defendants rest.

And it is hereby consented by the defendants' counsel that complainants have to and including March 15, 1887, to complete their proofs, complainant- reserving the right to apply to the court for further time, if necessary.

265 UNITED STATES PATENT OFFICE.

RODMOND GIBBONS, of San Francisco, California.

Pantaloons.

Specification forming part of Reissued Letters Patent No. 9616, dated March 22, 1881; original No. 178,287, dated June 6, 1876; application for reissue filed February 19, 1881.

To all whom it may concern:

Be it known that I, Rodmond Gibbons, of the city of San Francisco, in the State of California, have invented certain new and useful improvements in pantaloons and other garments of a similar character; and I do hereby declare the following to be a full, clear, and exact description thereof, reference being had to the accompanying drawings, forming part of this specification.

My invention relates to means for strengthening the crotch in the fly of pantaloons, and has for its object to prevent that tension at the crotch of the fly which is ordinarily produced, either by continued use of the garment or by some undue strain upon the latter, caused by the assumption of some posture by the person wearing it or by some mode of removal of the garment from the body calculated to produce such an effect, and which tension frequently operates to rupture either the cloth or the seams, or both, at the vicinity of the said crotch.

To this end my invention consists in the use, in connection with the fly, of a check piece or strip of cloth or other inelastic pliable material, arranged to bridge over and protect from tensional strain the crotch of said fly, as will be hereinafter more fully described.

My said invention may be employed in the manufacture of all descriptions of pantaloons and other garments of a similar character, its application to such garments adding greatly to the durability of the fly portion thereof by preventing any stretch of the cloth or rupture of the stitching at the crotch of the fly.

To enable those skilled in manufacturing that kind of garments to which my invention is applicable to make and use them with my said invention embodied therein, I will now proceed to more fully describe it, referring by letters to the accompanying drawings, in which—

(Here follows diagram marked p. 264.)

Figure 1 is a front view of the upper part of a pair of pantaloons representing the front of the fly as turned down for the purpose of more clearly illustrating the application thereto of my invention. Figs. 2 and 3 are, respectively, edge and face detail views of the fly portion only of the garment, drawn on an enlarged scale and with the fly distended, in order to more plainly show the improvement added thereto.

At Fig. 4 is shown a modified construction, in which the check-

R. GIBBONS.
Pantaloons.

264

No. 9,616. Reissued March 22, 1881.

No. 363
Patent Clothing Co
v. } 1,264
Glover et al.

Fig. 1.

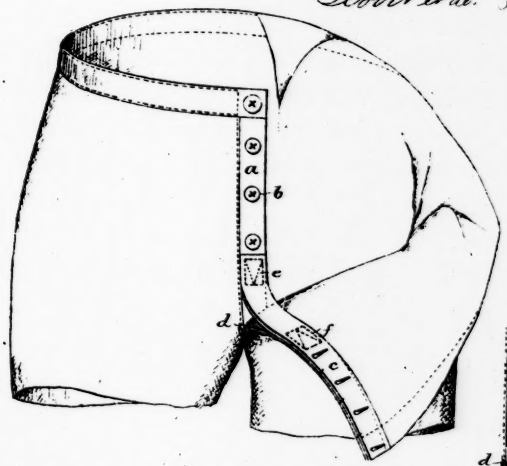


Fig. 1a.

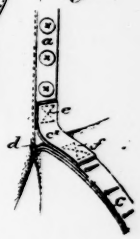


Fig. 2.

Fig. 3.

Attest;
Geo. K. Graham
Jacob Felbel

Inventor:
Redmond Gibbons
by
J. N. McGuire
Atty.

piece, instead of being integral with the button-hole strip, is composed of a separate piece of cloth.

In Figs. 1, 2, and 3 the button-strip of the fly is represented by *a* and the buttons by *b*. The button-hole strip is indicated by *c*, and between its button-holes it is stitched at points to the front of the garment in the ordinary way. The lower end of the button-hole strip *c* is not merely extended down into and fastened at the crotch *d*, as is the case in the common construction of pantaloons, but bridges over and extends beyond the crotch *d*, and is securely stitched to the button-strip *a*, as shown at *e*. The said button-hole strip is also very firmly secured to the garment below the lowest button-hole, as indicated at F.

At Fig. 4 is shown, instead of the preferred form of my invention, a construction in which a separate piece of cloth, c^2, serves as the bridge or check-piece. This construction I consider as involving the broad scope of my invention; for, although in this form the button-hole strip has its lower end secured at the crotch *d*, the latter point is relieved of all strain when the fly is pulled open by the piece c^2, arranged as shown.

My improvement in the specific form seen at Figs. 1, 2, and 3, which show it carried out in the manner preferred by me, adds nothing to the cost of the garment, but, instead, rather cheapens its manufacture, since its attachment to the garment of the lower end of the button-hole strip is effected at a point more accessible than that at which the connection by stitching has heretofore been made.

It will be seen that in a pair of pantaloons made according to my invention, carried out in either of the forms shown, any extreme or sudden distension of the fly that would otherwise tend to strain and rupture it at the point *d* will come wholly upon the check-piece which extends across said point, and that thus the crotch *d* is perfectly protected against injury from the effects of any such strain.

266 Having now fully described my invention in both the shown forms in which it may be practiced, what I claim as new, and desire to secure by letters patent, is—

1. The combination, with the fly of a pair of pantaloons or other similar garment, of an inelastic bridge or check-piece arranged across the crotch of the fly, and operating substantially as described, to receive any strain occasioned by the spreading apart of the fly, and which would otherwise be exerted upon the crotch of the fly.

2. In combination with the fly portion of a pair of pantaloons or other similar garment, a check-piece made integral with the button-hole strip of the fly, and adapted to prevent any tension at the crotch *d* that might operate injuriously upon it.

In testimony whereof I hereto subscribe my name this 18th day of February, 1881.

RODMOND GIBBONS.

In presence of—
JACOB FELBEL.
H. JANVIER.

268 UNITED STATES PATENT OFFICE.

DAVID NEUSTADTER, of San Francisco, California.

Overalls.

Specification forming part of Reissued Letters Patent No. 9863, dated September 6, 1881; original No. 196,693, dated October 30, 1877; application for reissue filed July 14, 1881.

To all whom it may concern:

Be it known that I, David Neustadter, of the city and county of San Francisco, State of California, have invented an improvement in overalls, of which the following is a specification.

My invention relates to a certain improvement in overalls and pantaloons, having for its object to strengthen the garments at the point where the inner seams meet, where the greatest strain is received, and at the same time to simplify the construction and cost of manufacture.

To this end my invention consists, essentially, in a continuous strip crossing the crotch of the fly-seam and entending upward on each side of the fly, and secured thereto throughout its entire length, so as to prevent ripping, all of which will be more fully hereinafter described.

The following description of the nature and mode of applying and using my invention is sufficiently full and clear to enable any person skilled in the art to make and use the same, reference being had to the accompanying drawings and the figures and letters of reference thereon, making part of this specification.

(Here follows diagram marked p. 267.)

Figure 1 is a front view of the upper portion of a pair of overalls with the fly open and turned back. Fig. 2 is a view of the continuous fly separate from the garment.

The parts composing the overall A are cut out and united together in the usual manner; but, instead of separate pieces being employed for the sides and facings of the fly, a continuous strip, B, is cut out lengthwise or in the direction of the greatest strength of the material, and after being doubled to form a finished edge on the front it is secured to one side of the opening in the garment by a line of stitching, *a*, and to the inner face of the opposite side by the stitching *b*. Thus the strip B forms, when in place, the front of one part of the fly, and the inside face, containing the button-holes, the other and opposite part, so that no other parts or pieces are required to complete this portion of the garment. It forms a continuous strengthening-facing extending across the point of junction of the inside by seams, and it has the quality or property of resisting the strain thrown upon the weakest point of the garment and of preventing any ripping or tearing of the material after a period of use

D. NEUSTADTER.

OVERALLS.

No. 9,863. Reissued Sept. 6, 1881

No. 363.
Patent Clothing Co.
v.
Glover et al.
} p. 267

Fig. 1.

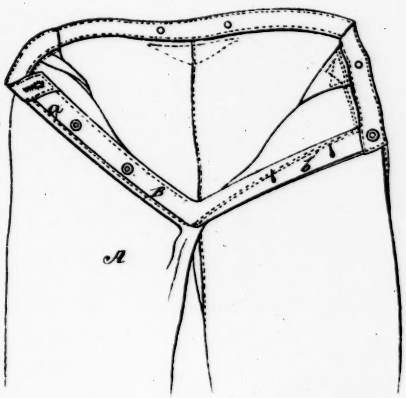
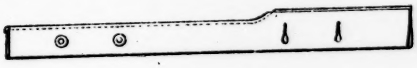


Fig. 2.



Witnesses.
Robt Everett.
C Albert Herbert

Inventor.
David Neustadter.
By James L. Norris
Atty.

and wear. The buttons are secured to one part or end, and the button-holes are contained in the opposite part of the strip B, as shown in Fig. 2. They may be attached to and combined with these strips B before they are secured to the sides of the overall-fronts, and thus reduce the time and the number of manipulations required in the process of manufacturing these garments.

The above-described mode of applying my invention may be used when neatness and completeness of finish are desired; but if greater economy is sought it is obvious that the strip B need not necessarily be extended to the waistband, because, as the crotch-seam is the point to be protected, it will be sufficient if the strip B extends beyond the crotch-seam so far only as may suffice to prevent it being ripped off by the strain to which it would be subjected in putting on or taking off the garment. The distance beyond the crotch-seam which the strip must extend in order to accomplish this result will vary according to the quality of the cloth and of the thread used in the manufacture; but in overalls intended for workingmen's wear where duck and thread of good quality are used, if the strip extends beyond the crotch a distance of three inches it will be amply sufficient to secure the desired result. Ordinarily, it will be found most convenient to shorten the strip, as described, on the side where the buttons are attached, and in such case that side of the fly-opening will be without facing, and the buttons will be attached to the garment itself.

The use of this continuous fly-facing gives a smoother and better finish to the inside of the overall, and adds to the comfort of the wearer by removing the superfluity of cloth that accumulates at the junction of the inside by seams when the fly and the facings are cut out of separate pieces.

As thus applied and arranged, my invention gives greater strength to the overall without increasing the amount of material at the point to be strengthened or adding to the labor of cutting out and making up the garment.

269 I am aware of the patent granted June 6, 1876, to R. Gibbons, and hereby disclaim the same; but,

Having thus fully described my invention, what I claim as new therein, and desire to secure by letters patent, is—

In overalls or pantaloons, a continuous strip crossing the crotch of the fly-seam and extending upward on each side of the fly, and secured thereto throughout its entire length so as to prevent ripping, substantially as described.

DAVID NEUSTADTER.

In presence of—
C. F. WYMAN.
F. H. WIDBER.

271 UNITED STATES PATENT OFFICE.

RODMOND GIBBONS, of San Francisco, California.

Improvement in Pantaloons.

Specification forming part of Letters Patent No. 178,287, dated June 6, 1876; application filed May 25, 1876.

To all whom it may concern:

Be it known that I, Rodmond Gibbons, of the city of San Francisco, in the State of California, have invented a new and useful improvement in pantaloons, and garments of a similar character, of which the following is a specification, reference being had to the accompanying drawing, forming a part hereof.

My invention relates to a fastening for the crotch in the fly of pantaloons or similar garments; and it consists in bridging said crotch with a check piece of cloth or other inelastic pliable material, as hereinafter fully described.

The object of this invention is to prevent that tension at the crotch ordinarily produced either by continued use of the garment, or by any undue strain caused by the assumption by the wearer of any posture of the body, or by the removal of the garment, calculated to produce such an effect.

The said improvement is applicable to all descriptions of pantaloons and garments of a similar character, its application to the garment adding greatly to its durability, by preventing the stretch of the cloth or stitching at the crotch.

To enable persons skilled in the art of manufacturing the garments to which my invention is adaptable, I describe the same as follows, referring to the annexed drawing.

(Here follows diagram marked p. 270.)

Figure 1 is a view of the upper part of a pair of pantaloons, the front of the fly being turned down, so as to show the application of the improvement. Figs. 2 and 3 are, respectively, edge and face views, on an enlarged scale, of the fly extended so as to show the attachment of the improvement. Fig. 4 shows a modification in construction.

In Figs. 1, 2, 3 the button strip of the fly is represented by *a*, and the buttons by *b*. The button-hole strip is indicated by *c*, and between the button-holes it is stitched to the front of the garment in the ordinary way. The lower end of the button-hole strip does not extend down and fasten into the crotch *d*, as in the common construction of pantaloons, but bridges over the crotch, being securely stitched at *e* to the button-strip *a*. The button-hole strip is also firmly secured at *f* below the lower button-hole.

Fig. 4 shows, instead of the preferred construction exhibited in the other figures, a separate piece of cloth serving as the bridge or

R. GIBBONS.

270

PANTALOONS.

No. 178,287.

Patented June 6, 1876.

No 363
Patent Clothing Co's Exp. 270
Glover et al.

Fig 1

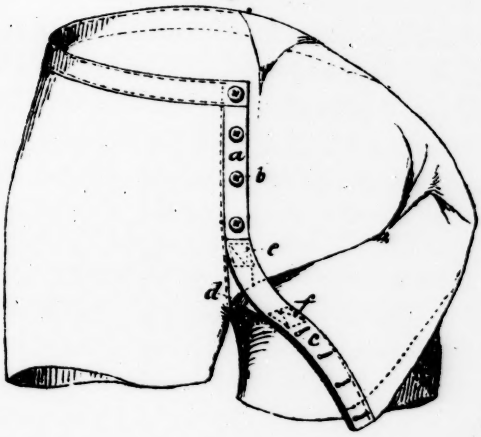
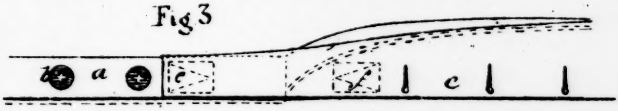


Fig. 4.

Fig 2

Fig 3



Witnesses.
Theo. Klungen.
W. C. Coffee

Inventor.
Redmond Gibbons,
by Atty W. J. Howard
attorneys.

D. NEUSTADTER. 272

Overalls.

No. 196,693. Patented Oct. 30, 1877.

No 363
Patent Clothing Co. Exp 272
v.
Glover et al

Fig 1

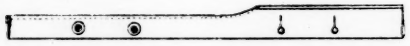


Fig 2

Witnesses:
Edward C. Osborn
James McThompson

Inventor
David Neustadter
By C. M. Smith.
His Attorney

check piece. This construction I deem to be within the scope of my invention.

My improvement, as seen in the manner preferred by me, adds nothing to the cost of the garment, but rather cheapens its manufacture, by causing the attachment of the lower end of the button-hole strip to be made at a point more easily reached than that at which the connection is ordinarily made.

Having described my invention, what I claim as new, and wish to secure by letters patent of the United States, is—

In combination with the fly of pantaloons or similar garments, an inelastic bridge or check piece, arranged across the crotch thereof, substantially as described, whereby the strain at the crotch, when the fly is opened and spread apart, is received by said bridge or check piece, instead of at the angle of the crotch itself.

In testimony whereof I hereto subscribe my name this 22d day of May, A. D. 1876.

RODMOND GIBBONS.

Witnesses:
WM. T. HOWARD.
H. A. DANIELS.

273 UNITED STATES PATENT OFFICE.

DAVID NEUSTADTER, of San Francisco, California.

Improvement in Overalls.

Specification forming part of Letters Patent No. 196,693, dated October 30, 1877; application filed October 28, 1876.

To all whom it may concern:

Be it known that I, David Neustadter, of the city and county of San Francisco, State of California, have invented an improvement in overalls, of which the following is a specification.

My invention relates to a certain improvement in overalls and pantaloons, having for its object to strengthen the garments at the point where the inner seams meet, where the greatest strain is received, and at the same time to simplify the construction and cost of manufacture.

To this end my invention consists in making the "fly" or facing of the sides of the front of the garment in one continuous strip or piece, and securing it in place on the edges of the front opening to the main portion of the garment, the said strip having the buttons of the fly on one side or half, and the button-holes in the other or opposite side, as will hereinafter more fully appear.

The following description of the nature and mode of applying and using my invention is sufficiently full and clear to enable any person skilled in the art to make and use the same, reference being had to the accompanying drawings, and the figures and letters of reference thereon, making part of this specification.

(Here follows diagram marked p. 272.)

Figure 1 is a front view of the upper portion of a pair of overalls with the fly open and turned back. Fig. 2 is a view of the continuous fly separate from the garment.

The parts composing the overall A are cut out and united together in the usual manner; but instead of separate pieces being employed for the sides and facings of the fly, a continuous strip, B, is cut out lengthwise, or in the direction of the greatest strength of the material, and, after being doubled to form a finished edge on the front, it is secured to one side of the opening in the garment by a line of stitching, *a*, and to the inner face of the opposite side by the stitching *b*. Thus the strip B forms, when in place, the front of one part of the fly, and the inside face containing the button-holes to the other and opposite part, so that no other parts or pieces are required to complete this portion of the garment. It forms a continuous strengthening-facing, extending across the point of junction of the inside by seams, and it has the quality or property of resisting the strain thrown upon the weakest point of the garment and of preventing any ripping or tearing of the material after a period of use and wear.

The buttons are secured to one part or end, and the button-holes are contained in the opposite part of the strip B, as shown in Fig. 2. They may be attached to and combined with these strips B before they are secured to the sides of the overall-fronts, and thus reduce the time and the number of manipulations required in the process of manufacturing these garments.

The use of this continuous fly-facing gives a smoother and better finish to the inside of the overall, and adds to the comfort of the wearer by removing the superfluity of cloth that accumulates at the junction of the inside by seams when the fly and the facings are cut out of separate pieces.

As thus applied and arranged, my invention gives greater strength to the overall without increasing the amount of material at the point to be strengthened or adding to the labor of cutting out and making up the garment.

I am aware of the patent granted June 6, 1876, to R. Gibbons, and hereby disclaim the same; but

Having thus fully described my invention, what I claim as new therein, and desire to secure by letters patent, is—

In overalls or pantaloons, the continuous strip B, extending the entire length of both sides of the fly, and secured thereto at every point, substantially as described and shown.

In witness whereof I have hereunto set my hand and seal this 18th day of October, 1876.

DAVID NEUSTADTER. [L. S.]

In presence of—
C. W. M. SMITH.
WILLIAM HARNEY.

D. LUBIN.

OVERALLS.

No. 303,578. Patented Aug. 12, 1884.

No 363 Patent Clothing Co. } p 274
Glover et al. }

Fig. 1

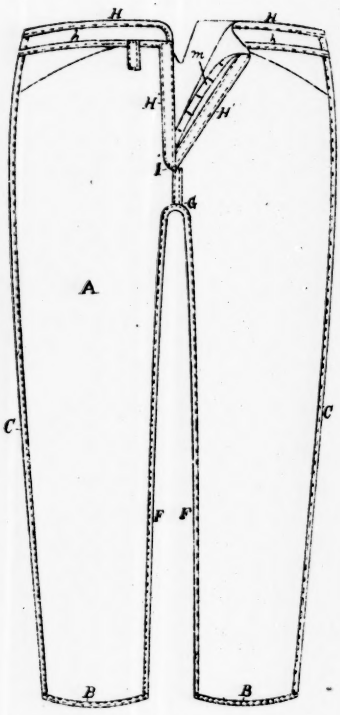


Fig. 2

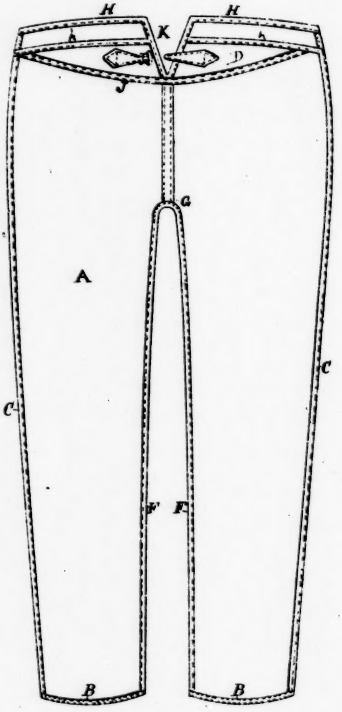


Fig. 3

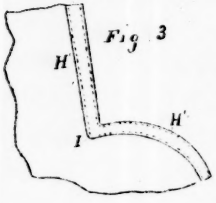


Fig. 4

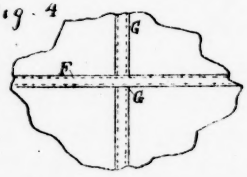


Fig. 5

Witnesses
Jas. L. Norris
C. M. Richardson

Inventors
David Lubin
by Dewey & Co
Attys

275 UNITED STATES PATENT OFFICE.

DAVID LUBIN, of San Francisco, California, assignor, by mesne assignments, to Isaac Oppenheimer, of New York, N. Y.

Overalls.

Specification forming part of Letters Patent No. 303,578, dated August 12, 1884. Application filed July 3, 1875.

To all whom it may concern:

Be it known that I, David Lubin, of the city and county of San Francisco, and State of California, have invented a certain new and useful improvement in overalls and pantaloons, of which the following is a specification:

My improvement in overalls and pantaloons is directed to strengthening and re-enforcing those points, particularly the crotch-seam at the fly-opening, at which the garment is liable to be ripped or torn in use. To this end I make use of a continuous strip, which extends down the sides of the fly or front opening and crosses the crotch-seam or point of juncture of the leg portions, said strip being attached to the garment at every point along its length. In this way I effectually prevent the garment from being ripped or torn at the base of the fly-opening.

In connection with the re-enforcing strip applied to the fly-opening, as above indicated, I make use of strengthening-strips at various other points throughout the garment, the whole arrangement being such that these strips form in effect what may be termed a "flexible frame," which preserves the shape of the garment, and so strengthens all weak points as to make it almost impossible to rip the garment.

(Here follows diagram marked p. 274.)

Referring to the accompanying drawings for a more complete explanation of my invention, figure 1 is a front view of a pair of overalls embodying my improvement. Fig. 2 is a rear view of the same. Fig. 3 represents more clearly and in detail the continuous re-enforcing strip H′, in which my improvement is comprised. Fig. 4 is a view representing the strips F G arranged to cross one another.

The overalls A may be made in the usual way. In Fig. 1 the fly or front opening is seen, the button-hole fly-strip being shown at *m*. To re-enforce this portion of the garment, I make use of a strip, H′ H′, which, as represented more plainly in Fig. 3, extends down one side of the fly or front opening and up the other side across the point I of juncture of the leg portions as one continuous strip, being stitched to the garment at every point along its length. In this way I effectually prevent the garment from being ripped or torn at the bottom of the fly-opening. The strip H′ H′ is continued up at each side to a strip, H, which is stitched around the top of the garment.

A side strip, J, is stitched along the lower part of the waistband until it meets the upper strip, H, where the latter is carried down through the opening K, where the buckle-strap crossed. I bind the bottom of the legs with a strip, as at P. From this point a similar strip, C, extends upward over the outside seam of each leg. I also sew over each seam of the waist a similar stay or strip, *h*, which passes around the body and binds the waist. A like strip, F, is stitched down over the inside seam of the legs, and this piece is made continuous from the bottom of one leg up across the middle or crotch seam, and thence down to the bottom of the other leg. A similar strip, G, is stitched along the crotch-seam, so as to cross the strip F, thus forming a cross, which will effectually secure the corner meeting-point of the four seams. Incidentally the side strips C will serve to strengthen the corners of the pocket-openings, although not intended especially for this purpose. In this manner I form for the garment a complete flexible frame, which greatly enhances its strength. Various methods of stitching this frame may be adopted; but the simplest and strongest will be to first stitch the edge of the strip inside the outer lap of the seam, as shown in Fig. 5, and then fold it over the back or outside of the seam and sew through both parts.

Having described my improvement, what I claim herein as new and of my own invention is—

Pantaloons or overalls having a continuous strip extending down the sides of the fly or front opening and crossing the crotch-seam or point of juncture of the leg portions, said strip being attached to the garment at every point along its length, substantially as hereinbefore set forth.

DAVID LUBIN.

Witnesses:
GEO. W. CRAWFORD.
JNO. A. GREEN.

277 UNITED STATES PATENT OFFICE.

JOHN H. ANDRUS, of New York, N. Y.

Improvement in Skin Under-Garments.

Specification forming part of Letters Patent No. 113,128, dated March 28, 1871.

To all whom it may concern:

Be it known that I, John H. Andrus, of the city, county, and State of New York, have invented a new and useful improvement in skin under-garments; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying *drawers* forming part of this specification.

(Here follows diagram marked p. 276.)

J. H. Andrus.

Shirt.

No. 113,128 Patented Mar. 28 1871.

Fig. 1

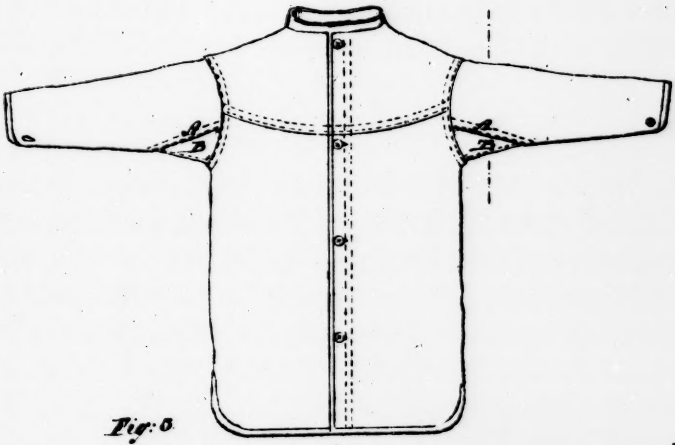


Fig. 3

Fig. 2

No. 363. Patent Clothing Co. of Glover Val. } p. 276

Witnesses:

C. Rattig
Alex. F. Roberts

Inventor:

J. H. Andrus

per Munn & Co

Attorneys.

This invention relates to improvements in shirts and drawers made of skin, such as buck, kid, or chamois skins; and it consists in the application of cloth, either woven or knit, in place of some of the skin removed, in the parts under the arms of the shirts and between the thighs of the drawers, which are more subject than other parts to damage by the action of the moisture given off by the body and retained in the said places, which has the quality to rot the skins in these parts in a very short time.

Figure 1 is a front elevation of a skin shirt having my improvement applied. Fig. 2 is a section across the arm on the line *y y* of Fig. 1. Fig. 3 is a plan view of a pair of drawers having my improvement.

Similar letters of reference indicate corresponding parts.

These skin shirts and drawers have been found practically to be very useful for wear; but it is found that in consequence of the slower escape of the matter discharged from the body under the arms and between the thighs, or it may be the greater amount discharged thereat, the parts of the sleeves covering the armpits, and the parts of the drawers between the thighs, are kept damp and are very soon destroyed. I therefore propose to remove small portions of the sleeve thereat, as indicated at A, and of the drawers, as at D, and substitute small pieces, B, of flannel or other woven or knit stuff which will not be so affected by the said matter, and I thereby completely remove the present objections to these garments, which in all other respects are much more desirable than any made of woven or knit stuff.

Having thus described my invention, I claim as new and desire to secure by letters patent—

Garments, worn in contact with the person, formed of animal skin in all parts except under the arms and between the legs, combined with woven or knit fabrics at said last-mentioned places, as and for the purpose specified.

The above specification of my invention signed by me this 2d day of December, 1870.

JOHN H. ANDRUS.

Witnesses:
GEO. W. MABEE.
C. L. TOPLIFF.

279 117,885.

UNITED STATES PATENT OFFICE.

IRVING A. HOWE, of Boston, Massachusetts.

Improvement in Drawers.

Specification forming part of Letters Patent No. 117,885, dated August 8, 1871.

To all whom it may concern:

Be it known that I, Irving A. Howe, of Boston, in the county of Suffolk and State of Massachusetts, have invented an improvement

in drawers, &c.; and I do hereby declare that the following, taken in connection with the drawing which accompanies and forms part of this specification, is a description of my invention, sufficient to enable those skilled in the art to practice it.

(Here follows diagram marked p. 278.)

In making drawers it is customary to make the legs separate, joining them together at the seat or body by a central seam. This seam not only causes an unpleasant and troublesome tightness at the crotch, so that the strain tends to impede free movement of the legs, but the seam itself is a source of irritation to many persons.

To obviate this defective construction I make such a garment with an inserted piece or gusset between the legs, said gusset being preferably of lozenge-shape, and, being whole or unseamed at its center, by its position and relation to the leg part on each side of it, it insures perfect freedom of movement of the legs, the fullness effected by it rendering it impossible, under any possible movement of the legs, that the cloth between them can be tightened or brought under strain.

It is in a pair of drawers having a whole or unseamed gusset-piece inserted between the legs at the crotch, and imparting a fullness to the garment at this point, and lapped and protected in part by the fly-pieces, that my improvement consists.

The drawing represents the upper or crotch part of a pair of drawers embodying the improvement.

a b denote the two legs; *c*, the upper part or body; *d*, the opening or fly; *e*, the gusset-piece; and *f g*, the two fly-pieces which lap the upper or front point of the gusset-piece *e*, serving to strengthen and protect it.

It will thus be seen that the strength will be given just where it is most needed, and the fullness, without any middle seam, just where it is needed; and there cannot, under any conditions, be any strain upon the gore or gusset, which never becomes distended or strained during wear.

I lay no claim to elastic or perforated gores of any kind; but

I claim—

The described improvement in drawers, consisting in forming them with the full unseamed piece or gusset *e* inserted and located as shown and set forth, the point of the gusset being protected by the fly-pieces *f g* lapping thereon.

IRVING A. HOWE.

Witnesses:

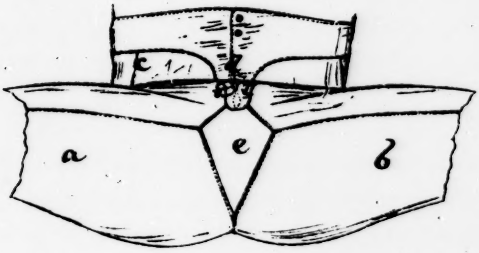
FRANCIS GOULD.

S. B. KIDDER.

Irving A. Howe.
Imp't in Drawers &c.

117885 PATENTED AUG 8 1871

No. 363.
Patent Clothing Co
vs.
Glowrstal.
} p. 278



Witnesses
S. N. Wilder
M. M. Fenlingham

Irving A. Howe
by his Attys.
Crosby & Gould.

N. H. BRUCE.

Knitted Garments.

No. 159,891 Patented Feb. 16, 1875.

No. 363.
Patent Clothing Co
" Glover et al
p. 280.

Fig. 1.

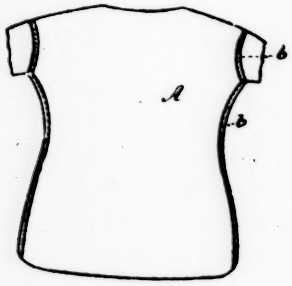


Fig. 2.

Fig. 6

Fig. 3.

Fig. 4.

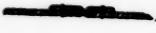


Fig. 5.

Witnesses.
L. H. Latimer.
Wm Pratt.

Inventor.
Norman H Bruce
PER Emery Simpson ATTYS.

281 UNITED STATES PATENT OFFICE.

NORMAN H. BRUCE, of Clinton, Massachusetts.

Improvement in Knitted Garments.

Specification forming part of Letters Patent No. 159,891, dated February 16, 1875; application filed February 10, 1875.

To all whom it may concern:

Be it known that I, Norman H. Bruce, of Clinton, in the county of Worcester and State of Massachusetts, have invented an improved seam for knitted goods, of which the following is a specification:

My invention relates to garments or articles of knitted material united by a seam-piece, substantially as hereinafter described; also, in a new seam for, or method of, uniting knitted garments.

(Here follows diagram marked p. 280.)

Figure 1 is a view of a knitted vest. Fig. 2 is a full-sized view of the seam, shown as connecting or forming the selvage or other edges of knitted garments, the garment being broken away. Fig. 3 is a section of the seam-forming tape, and Fig. 4 is a section of the same with knitted goods placed therein and stitched. Fig. 5 shows an ordinary seam, and Fig. 6 represents a pair of drawers.

In the drawing, A represents knitted garments—vest and drawers—having the sides or edges of the knitted material or web joined by my improved seam. The knitted material A forming the garment, whether for drawers, vests or wrappers, has its edges or selvage edges placed between the edges of the quadruple-edged tape *b* and the edges *c c'* of the tape, and the inclosed knitted goods are united by one or more rows of stitching, *e*. This tape may be formed by stitching it longitudinally through the center, or nearly so, and the edges of the knitted fabric are then inserted, as shown.

My improved seam consists of the quadruple-edged tape, united as described, and of the edges of the knitted fabric and the two rows of stitching, uniting the tape and knitted goods.

Heretofore in uniting knitted goods it has been customary to lap or fell the seams, making them coarse and clumsy; or the edges have been left to project, forming an objectionable edge, to be afterward sewed, or at times such edges are not sewed; or else the edges have been united by sewing through the loop directly at the edge of the knitted fabric; but this cannot be done on bias-cut knitted goods. Knitted goods have also been stitched over and over by a button-hole stitch.

My seam, composed of the quadruple-edged tape and lines of stitching, makes a strong seam, a smooth seam, not objectionable to the person, not bungling, and one cheaply and easily produced. The seam forms a firm holding means for the edges of the garment, and prevents the distension of the garment at that point, so as to

obviate breaking stitches, as is common in knitted goods when stretched.

With this my improved seam I can use a lock-stitch if desired.

I am aware that a quadruple-edged tape is not, broadly, new, and I do not, therefore, claim such tape broadly.

Having described my invention, I claim—

A knitted shirt or other garment, the edges of which are united by means of a quadruple-edged tape, substantially as described and shown.

In testimony whereof I have signed my name to this specification in the presence of two subscribing witnesses.

NORMAN H. BRUCE.

Witnesses:
J. B. CROSBY.
S. B. KIDDER.

283 UNITED STATES PATENT OFFICE.

WILLIAM S. TAYLOR, of Brooklyn, New York.

Improvement in Skirts.

Specification forming part of Letters Patent No. 143,198, dated September 23, 1873; application filed June 3, 1873.

To all whom it may concern:

Be it known that I, William S. Taylor, of the city of Brooklyn, county of Kings and State of New York, have invented certain improvements in ladies' skirts, of which the following is a specification:

This invention pertains to the class of wearing apparel styled as "ladies' skirts;" and it consists in the peculiar manner of cutting the material to form the skirt, and in the application of the band to surround the waist, and thereby fasten the skirt upon the body in such a manner that the usual necessity of plaits, gathers, &c., are dispensed with in making the skirt hang smoothly from the waist and over the hips, and without being drawn out of shape in continued use.

(Here follows diagram marked p. 282.)

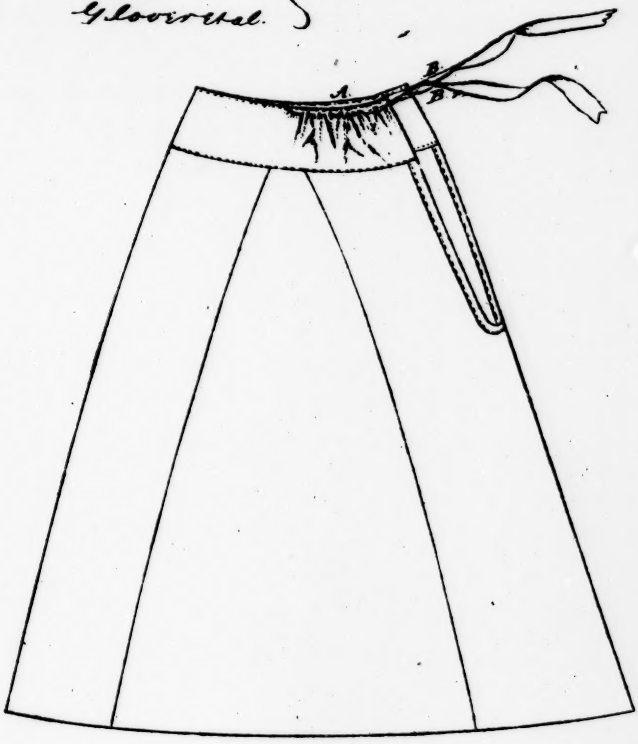
The plan or side view of the skirt, as here shown folded together, illustrates the form of cutting the material to accomplish the desired object; and it consists in cutting the breadths of a tapering form toward the top and not so wide as at the bottom, and then forming the upper end upon the arc of a circle precisely as in the formation of a sheet of metal to make a funnel or the formation of a circular cape. To the upper end of the said breadths, or that which forms the skirt proper, is attached the band, which is also cut with the same curvature as the upper end of the skirt, and to the greater arc of said band, or its lower edge, is joined the upper end of the skirt, and within the upper or smaller arc of the band is formed a cord or

W. S. TAYLOR. 282

Skirts.

No. 143,198. Patented September 23, 1873.

No. 363.
Patent Clothing Co.
of
Gloversville.
} p 282



WITNESSES.
E. N. Eliot
Boyd Eliot

William S. Taylor
INVENTOR.

J. H. Walker,

Boot.

No. 108,948. Patented Nov. 1. 1870.

No. 363.
Patent Clothing Co. v. Gloversville } p. 284.

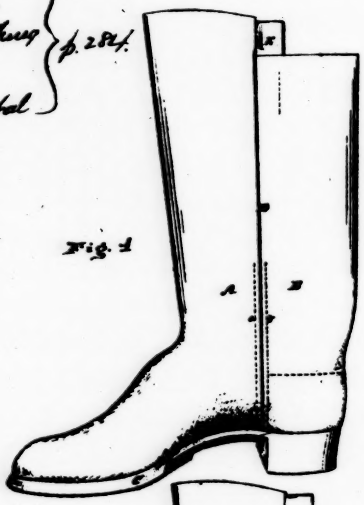


Fig. 1

Fig. 3

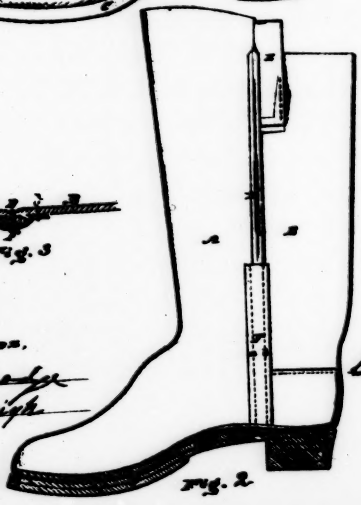


Fig. 2

Witnesses.
Thos. H. Dodge
Chas. H. Pendleigh.

Inventor.
J. H. Walker.

draw-string, as shown at A, in which tapes or cords may be fastened to adjust the band around the waist, and to draw it in slightly if too large, and by tying said cords or tapes the skirt is fastened and held around the waist. The formation of the upper end of the skirt in the arc of a circle and the band to correspond therewith, as shown in the drawings, constitute in their combination the invention, as the band fits snugly around the taper of the waist, or is funnel-shaped, with the mouth of funnel downward, and to the lower edge of which the skirt proper is attached, which is also cut to fit in the same manner, and thereby give room for the expanded portion of the body below the waist. The draw strings or cords, as at B B, may be attached near the center, so that the back portion of the skirt will be gathered if too large to fit exactly around the waist.

Such a form of cutting the skirt and applying a band to correspond is very useful in all kinds of ladies' underskirts, whatever the kind of material used may be, as it saves material in its manufacture and weight to the user, and permits the outer dress to lie smoothly over the body below the waist, if desired.

I therefore claim—

As a new article of manufacture, a skirt provided with the circular band A, constructed and arranged as and for the purpose specified.

WILLIAM S. TAYLOR.

Witnesses:
E. N. ELIOT.
BOYD ELIOT.

285 UNITED STATES PATENT OFFICE.

JOSEPH H. WALKER, of Worcester, Massachusetts.

Improvement in Boots.

Specification forming part of Letters Patent No. 108,948, dated November 1, 1870.

To all whom it may concern:

Be it known that I, Joseph H. Walker, of the city and county of Worcester and State of Massachusetts, have invented certain new and useful improvements in boots, and which improved boot I term the "saddle-seam boot;" and I do hereby declare the following to be a full, clear, and exact description of the same, reference being had to the accompanying drawing, which forms a part of this specification, in which—

(Here follows diagram marked p. 284.)

Figure 1 represents a side view of my saddle-seam boot. Fig. 2 represents a central vertical section of the same; and Fig. 3 represents a transverse section of the seam.

To enable those skilled in the art to which my invention belongs

J. H. Walker,

Boot.

No. 108,948. Patented Nov. 1, 1870.

No. 363.
Patten Clothing
Co.
v.
Glover et al
p. 284.

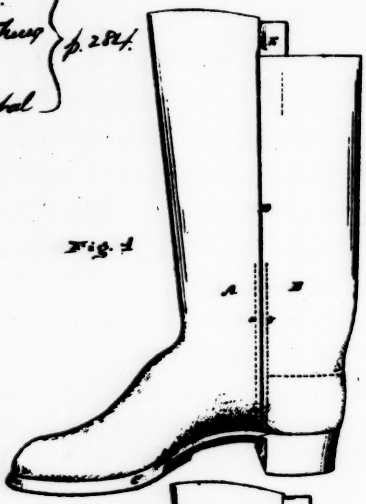


Fig. 1

Fig. 3

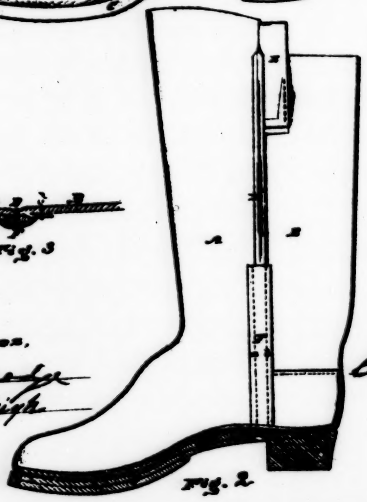


Fig. 2

Witnesses.
Wm. G. Dodge
Chas. H. Burleigh.

Inventor.
J. H. Walker.

draw-string, as shown at A, in which tapes or cords may be fastened to adjust the band around the waist, and to draw it in slightly if too large, and by tying said cords or tapes the skirt is fastened and held around the waist. The formation of the upper end of the skirt in the arc of a circle and the band to correspond therewith, as shown in the drawings, constitute in their combination the invention, as the band fits snugly around the taper of the waist, or is funnel-shaped, with the mouth of funnel downward, and to the lower edge of which the skirt proper is attached, which is also cut to fit in the same manner, and thereby give room for the expanded portion of the body below the waist. The draw strings or cords, as at B B, may be attached near the center, so that the back portion of the skirt will be gathered if too large to fit exactly around the waist.

Such a form of cutting the skirt and applying a band to correspond is very useful in all kinds of ladies' underskirts, whatever the kind of material used may be, as it saves material in its manufacture and weight to the user, and permits the outer dress to lie smoothly over the body below the waist, if desired.

I therefore claim—

As a new article of manufacture, a skirt provided with the circular band A, constructed and arranged as and for the purpose specified.

WILLIAM S. TAYLOR.

Witnesses:
E. N. ELIOT.
BOYD ELIOT.

285 UNITED STATES PATENT OFFICE.

JOSEPH H. WALKER, of Worcester, Massachusetts.

Improvement in Boots.

Specification forming part of Letters Patent No. 108,948, dated November 1, 1870.

To all whom it may concern:

Be it known that I, Joseph H. Walker, of the city and county of Worcester and State of Massachusetts, have invented certain new and useful improvements in boots, and which improved boot I term the "saddle-seam boot;" and I do hereby declare the following to be a full, clear, and exact description of the same, reference being had to the accompanying drawing, which forms a part of this specification, in which—

(Here follows diagram marked p. 284.)

Figure 1 represents a side view of my saddle-seam boot. Fig. 2 represents a central vertical section of the same; and Fig. 3 represents a transverse section of the seam.

To enable those skilled in the art to which my invention belongs

to make and use the same, I will proceed to describe it more in detail.

The nature of my invention consists in an improved boot, as hereinafter explained.

In the drawing, the parts marked A represent the front of the upper; B, the back; and C, the sole.

The front A and back B are joined at the sides by means of a welt-seam, D, the straps F being stitched in with the same seam, as indicated.

The seam D is covered for nearly one-half of its length from its lower end by means of a brace or saddle strap of leather, F, the edges of which are secured to the back B and front A by rows of stitching *a b*, as shown in the drawing.

By combining the brace or saddle strip F with the seam D above the top of the counter G, as above explained, the stitches of said seam are protected from injurious strain, caused by the working of the parts A and B, as the ankle is bent in walking, whereby a more durable boot is produced than by the old mode of manufacture, which consisted in extending the strip F only up to the top of the counter.

The saddle-piece F, as applied previous to my invention, was in many respects a disadvantage to the boot, since it held the front part A below the upper line of the counter from yielding, thus causing the leather to bend at the junction of the stitching of the top of the counter with the side seams of the leg, whereby the side seam stitching-thread soon gave way at that point, and the boot soon came to mending, owing to the rapid ripping of the seam in both directions.

By my invention the foregoing objections are obviated, since the side seams are braced and supported at such a distance above the top of the counter and counter-stitching that there is no liability of the ripping of the side seams, and the boot will wear at those points until the leather wears out upon the other parts of the boot. Again, the brace or saddle F keeps the air from the stitches of the welt-seam D, and thereby prevents air-rotting of the thread.

Having described my improvements in boots, what I claim therein as new and of my invention, and desire to secure by letters patent, as an improved article of manufacture, is—

A boot having a saddle or brace piece applied with the boot to the side seams, and extending up on said seams above the top line of the counter, as and for the purposes set forth.

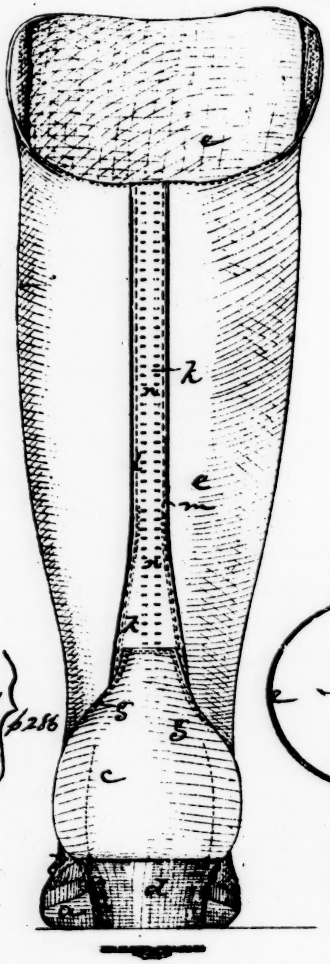
J. H. WALKER.

Witnesses:
THOS. H. DODGE.
CHAS. H. BURLEIGH.

B. C. YOUNG. 286

Improvement in Riding-Boots.

No. 129,776. Patented July 23, 1872.



No. 363.
Patent Clothing Co. } 6286
v.
Glover et al.

Witnesses.
M. M. Trethingham
C. Warren Brown

Inventor
Barker & Young
By his Attys.
Crosby & Gould

287 UNITED STATES PATENT OFFICE.

BARKER C. YOUNG, of Boston, Massachusetts.

Improvement in Riding-Boots.

Specification forming part of Letters Patent No. 129,776, dated July 23, 1872.

To all whom it may concern:

Be it known that I, Barker C. Young, of Boston, in the county of Suffolk and State of Massachusetts, have invented an improvement in riding-boots, &c.; and I do hereby declare that the following, taken in connection with the drawing which accompanies and forms part of this specification, is a description of my invention sufficient to enable those skilled in the art to practice it.

My invention relates particularly to the construction of a long-legged riding-boot; and in my invention I form the long leg of one piece of leather, seamed at the back, such seam being covered and protected by an outer brace or strip, which is stitched at each edge of the leg, forming a protection to the seam and preserving the tubular form of the leg. My invention consists, primarily, in a high-topped or long-legged riding-boot, the leg of which, being made in one piece and back-seamed, has its seam covered and fortified by a brace that is stitched at its opposite edges to the leg. The invention also consists in a method of strengthening braces or stays, to be used for covering and protecting such or analogous seams.

(Here follows diagram marked p. 286.)

The drawing represents a boot embodying my invention. A shows a rear side view of the boot. B is a cross-section of the leg.

a denotes the sole; *b*, the vamp; *c*, the heel-quarter; *d*, the heel; and *e*, the leg, the leg being a separate piece of leather from the quarter and vamp, and stitched to them by a row of stitches, *g*. The leg *e* is preferably formed of grain-leather, and is made in one piece, the two edges *h i* being laid together, preferably, with their inner faces abutting, and united by a row of stitches, leaving the two edges outermost, and the extreme edges being then laid back, the seam being opened both on the inside and on the outside of the seam. Over the outside of this seam, when so opened, I stitch the brace *k*, extending said brace from the top of the leg to the quarter *c*, fastening it by two rows of stitches, *l m*, which pass through the brace and leg and leg-lining. This brace serves to keep the parts distended, strengthens the seam, imparts a finish, and enables the back-seamed leg to be easily made. To prevent abrasive wear of the outer surface of such braces said surface may be made or provided with reed-wire-lock stitches *n*, as seen at A, the wires lying upon the surface and acting as guards to keep the saddle-straps, &c., from injurious contact with the brace, and to prevent the brace from crippling or

breaking directly opposite to the seam it covers. These wire-lock stitches are applied to the brace alone, before it is stitched to the leg, and do not form a bond of union between the brace and leg.

I claim—

In a brace fastened at its edges to the boot-leg, the line of re-enforcing wire-lock stitches running through the center of the brace, substantially as shown and described.

BARKER C. YOUNG.

Witnesses:
FRANCIS GOULD.
M. W. FROTHINGHAM.

289 UNITED STATES PATENT OFFICE.

JOHN B. GLOVER, of Dubuque, Iowa.

Overalls.

Specification forming part of Letters Patent No. 224,175, dated February 3, 1880. Application filed July 28, 1879.

To all whom it may concern:

Be it known that I, John B. Glover, of Dubuque, in the county of Dubuque and State of Iowa, have invented a new and useful improvement in overalls, &c.; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon, making part of this specification.

This invention is in the nature of an improvement in overalls or pantaloons; and the invention consists in overalls or pantaloons with the button-hole strip of the fly thereof extending below the crotch and folded over and secured to the opposite or button side of the fly-opening, thereby re-enforcing the crotch, as is more particularly hereinafter set forth.

(Here follows diagram marked p. 288.)

In the accompanying sheet of drawings, figure 1 is a front view of part of overalls showing my invention, and Fig. 2 a section through line *x x*, Fig. 1.

Similar letters of reference indicate like parts in the two figures.

A represents a pair of overalls or pantaloons, which may be made of any desired material and size, and cut with the ordinary front or fly opening B, to be buttoned and unbuttoned, as in overalls commonly made. The button-hole part C, however, of the fly of my overalls has its button-hole strip *a* (which is formed independently of the body of the part C and is stitched to its inner side, as at *b*) cut of sufficient length to permit the lower part of this strip *a* to extend below the crotch *c* of the overalls, as shown at *d*, Fig. 1. The portion *d* of the button-hole strip *a* that so extends is stitched to the button-strip *e* of the opposite or button side D of the fly-opening, so

J. B. GLOVER.
Overalls.

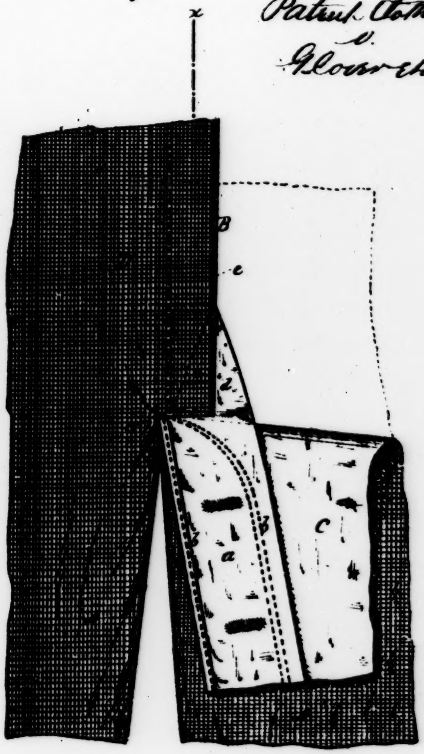
288

No. 224,175. Patented Feb. 3, 1880.

Fig: 1.

No. 363.
Patent Clothing Co.
v.
Glover et al.

Fig: 2.
p 288



Witnesses:
H. L. Wattenberg
William Anderson

Inventor:
John B Glover
per Geo. H. Graves
Atty.

that when the part D and the part C are in position for use, as shown in Figs. 1 and 2, this portion *d* of the button-hole strip *a* is folded up and secured to the inner side of the button-strip *e*.

By extending the button-hole strip *a*, with its part *d* below the crotch *c* and securing it to the button side D of the fly-opening, as described, the crotch, which is particularly liable, as is well known, to tear out from undue strain, is substantially re-enforced, for it will be observed that no part of the strain at the crotch is received by stitching of any kind; but, to the contrary, it is received directly by the fold of the lower part, *d*, of the button-hole strip *a*, and the liability to tear at the crotch is avoided without any additional stitching or staying at that point, as is done with overalls or pantaloons of common construction.

I am aware that overalls have heretofore been made by stitching in the inside of the fly and across the crotch pieces of elastic and non-elastic cloth, and also by inserting rivets at this point, and by so cutting the cloth as to admit of a portion being overlapped, and in this way forming a re-enforce; but all of these methods being wholly different from the one hereinbefore described, I lay no claim to them; but,

Having thus described my invention, what I claim as new, and desire to secure by letters patent, is—

The improved overalls or pants described, having the independent button-hole strip *a*, provided with the part *d*, extended beneath the button-strip *e* and stitched to its inner side, all constructed and arranged as and for the purpose specified.

In testimony whereof I have signed my name in the presence of two witnesses.

JOHN B. GLOVER.

Witnesses:
G. V. SMOCK.
G. L. TORBETT.

290 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the thirteenth day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable Nathaniel Shipman, judge.

PATENT CLOTHING COMPANY (Limited)
vs.
HENRY B. GLOVER *et als.* } Cal. April Term, 1887.

The above cause coming on this day for final hearing upon pleadings and proofs—

Mr. William A. Jenner is heard in behalf of complainant.

Mr. Gilbert M. Plympton is heard in behalf of defendants.

Mr. Causten Browne is heard in behalf of complainant.

(Further argument is adjourned to 14th inst.)

291 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday, the fourteenth day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable Nathaniel Shipman, judge.

PATENT CLOTHING COMPANY (Limited)
vs.
HENRY B. GLOVER *et als.*

Argument in above cause being resumed this day pursuant to adjournment—

Mr. Plympton closes in behalf of defendants.

Mr. Browne closes in behalf of complainants.

Curia advisari (*advisare?*) *vult.*

292 Circuit Court of the United States for the Southern District of New York.

PATENT CLOTHING COMPANY (Limited)
vs.
HENRY B. GLOVER *et al.*

SHIPMAN, *J.:*

This is a bill in equity to restrain the defendants from the alleged infringement of the second claim of reissued letters patent No. 9616, applied for February 19th, 1881, and issued March 22nd, 1881, to Rodmond Gibbons for an improvement in pantaloons. The original patent was dated June 6th, 1876.

The specification of the original patent says that the invention "relates to a fastening for the crotch in the fly of pantaloons and similar garments; and it consists in bridging said crotch with a check piece of cloth or other inelastic pliable material, as hereinafter fully described."

293 The patentee further says: "The lower end of the button-hole strip does not extend down and fasten into the crotch *d*, as in the common construction of pantaloons, but bridges over the crotch."

* * * * * * *

Fig. 4 shows, instead of the preferred construction exhibited in the other figures, a separate piece of cloth serving as the bridge or check piece."

The single claim of the original patent was as follows:

"In combination with the fly of pantaloons or similar garments, an inelastic bridge or check piece arranged across the crotch thereof, substantially as described, whereby the strain at the crotch, when the fly is opened and spread apart, is received by said bridge or check piece instead of at the angle of the crotch itself."

The claims of the reissued patent are as follows:

"1. The combination, with the fly of a pair of pantaloons or other similar garment, of an inelastic bridge or check piece arranged

across the crotch of the fly and operating, substantially as described, to receive any strain occasioned by the spreading apart of the fly and which would otherwise be exerted upon the crotch of the fly.

2. In combination with the fly portion of a pair of pantaloons or other similar garment, a check piece made integral with the
294 button-hole strip of the fly and adapted to prevent any tension at the crotch *d* that might operate injuriously upon it."

The overalls which the defendants make do not have a bridge spanning an open space between the bridge and the point where the two sides of the fly meet, but the button-hole strip extends down to and is fastened at the crotch and extends upwards and is secured to the button strip at the opposite side of said fly portion, being lapped behind the button strip. The overalls which the plaintiff now makes are of the same construction, except that the button-hole strip is lapped upon the front side of the button strip. This difference is not material.

The question which first presents itself is whether under a proper construction of the reissued patent it should not be confined to a bridge or check piece, which is arranged across the fly front and bridges over and is not fastened at the crotch.

295 The reissue was applied for four years and eight months after the original patent was granted and several months after the defendants began to make and sell the garments which are said to infringe, but it is earnestly contended that the reissue is not an enlargement of the original patent, but is a more careful statement of the invention which was therein described and claimed.

I am clearly of the opinion that the invention of the original patent, as described and claimed therein, was a piece of inelastic, flexible material arranged across the crotch as a bridge, with its two ends secured to opposite sides of the fly front at points so far down the two sides that when a strain is brought thereon the bridge will take the entire strain. The original specification, drawings, and claim show that the bridge was the invention for which the patent was applied for, and that any other invention is beyond its terms. It is also the invention of the first claim of the reissue.

296 The second claim of the reissue was designed to include a check piece which is not only integral with the button-hole strip, but which extends down to and is fastened at and crosses the crotch of the fly and thence extends up upon the other side of the fly and is fastened to the button strip. This is not the invention of the original patent, which expressly said that the button-hole strip when serving also as a bridge does not extend down and fasten into the crotch.

The second claim of the reissue is invalid unless it is limited to the bridge or check piece of the original claim. With that construction there is no infringement and the bill is dismissed.

Causten Browne and William A. Jenner, for the plaintiff.
Gilbert M. Plympton, for the defendants.

(Endorsed:) Circuit court of the United States for the southern district of New York. Patent Clothing Company (Limited) *vs.*

Henry B. Glover *et al.* Decision. Shipman, J. U. S. circuit court. Filed May 14, 1887. Timothy Griffith, clerk.

297 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the thirty-first day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable Nathaniel Shipman, circuit judge.

PATENT CLOTHING COMPANY (Limited)
vs.
HENRY B. GLOVER *et als.*

The above cause coming on this day for rehearing—
Mr. Causten Browne is heard in behalf of complainant.
Mr. Gilbert M. Plympton is heard in behalf of defendants.
Curia advisari vult.

298 At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held in the city of New York on the 31st day of May, 1887.

Present: Honorable Nathaniel Shipman, judge.

PATENT CLOTHING COMPANY (Limited)
vs.
H. B. GLOVER, JOHN B. GLOVER, LESTER C. BISSELL, and ALONZO J. PARKER. } In Equity.

This cause having come on for final hearing upon the pleadings and proofs, and having been argued by Mr. Causten Browne and Mr. William a Jenner for the complainant and Mr. Gilbert M. Plympton for the defendants, and the same having been duly considered and decided and an opinion filed on the 14th day of May, 1887, directing the bill of complaint to be dismissed, and
299 thereafter a rehearing of said cause, upon motion of the complainant, having been ordered, and said cause having been reargued by counsel for the respective parties—

Now, upon due consideration of the same, and the court being of opinion that the second claim of reissued patent No. 9616, granted to Rodmond Gibbons on the 22nd day of March, 1881, is invalid unless it is limited to the bridge or check-piece of the original claim, and with that contruction there is no infringement:

It is ordered, adjudged, and decreed that the bill of complaint in said cause be, and the same hereby is, dismissed with costs to the defendants, to be taxed by the clerk of this court, the defendants to have execution therefor.

(Signed) N. SHIPMAN, *Judge.*

(Endorsed:) U. S. circuit court, southern dist. of N. Y. Patent Clothing Co. (Limited) *vs.* H. B. Glover *et al.* Decree dismissing

bill. G. M. Plympton, def'ts' sol'r, 245 B'dway, New York. Filed Aug. 4, 1887.

(File-mark:) U. S. circuit court. Timothy Griffith, clerk.

300 Circuit Court of the United States, Southern District of New York.

PATENT CLOTHING COMPANY (Limited) *vs.* HENRY B. GLOVER *et als.* } In Equity.

It is hereby stipulated that the foregoing may constitute the record to be sent by the clerk of this court to the Supreme Court of the United States on the appeal to said Supreme Court in the above-entitled cause without prejudice to any motion to correct the same if any errors are found to be contained therein; and it is further stipulated that the exhibits in the cause may be retained by the clerk of this court until the hearing on said appeal.

New York, September —, 1887.

301 U. S. Circuit Court, Southern District of New York. In Equity.

PATENT CLOTHING COMPANY, Limited, *vs.* H. B. GLOVER *et al.* } Affidavit of Service.

STATE OF NEW YORK, *City and County of New York,* } *ss:*

Phillips Abbott, of the city of Brooklyn, New York, being duly sworn, says that he is above the age of thirty years, and that on the nineteenth day of August, in the year one thousand eight hundred and eighty-seven, he served the annexed petition of appeal and the annexed citation on George N. Plympton, Esq., defendants' solicitor herein, at his office, No. 245 Broadway, New York city, N. Y., by leaving a copy of each of the same to and leaving the same with him and showing him the signature of the court on the original petition and citation.

(S'g'd) PHILLIPS ABBOTT.

302 Sworn to before me this 19th day of August, 1887.

ROB'T P. GETTY, JR.,
Notary Public, Westchester Co.

[NOTARIAL SEAL.]

(Cert. filed in N. Y. Co.)

303 Circuit Court of the United States, Southern District of New York. In Equity.

PATENT CLOTHING COMPANY, Limited,
vs.
H. B. GLOVER, JOHN B. GLOVER, L. C. BISSELL, and A. J. PARKER, Composing the Firm of H. B. Glover & Company.

The honorable the Supreme Court of the United States:

The appeal of the above-named Patent Clothing Company, Limited, complainant and appellant, respectively shows—

That upon the 18th day of January, 1884, the bill of complaint herein was filed in the circuit court of the United States for the second circuit and southern district of New York against the above-named defendants, charging them with wrongfully infringing certain reissued letters patent of the United States, No. 9619, dated March 22nd, 1881, owned by said complainant; that sub-
304 pœnas were duly issued on said bill and duly served; that the said defendants appeared, and on or about the 29th day of November, 1884, filed their amended answer to the said bill; that complainant duly filed its replication to said answer; that thereafter testimony was duly taken for both sides, and thereafter and at the April term, 1887, of said court this cause came on to be heard on the pleadings and proofs and all proceedings thereon, and was argued by counsel, and thereafter his honor Nathaniel Shipman, before whom the said cause was argued, rendered his decision in said cause, wherein he decided that the second claim of said reissue patent is invalid unless it is limited to the bridge or check piece of the original claim, and that with that construction there is no infringement, and dismissed the bill of complaint; that thereafter costs were duly taxed in said cause against the complainant in the sum of four hundred and sixty-six dollars and seventy-five
305 cents, and on or about the 16th day of August, 1887, a final decree was entered herein in favor of the defendants, dismissing the bill and awarding the said sum as costs against the complainant.

Wherefore the complainant appeals from the whole of said decree of said circuit court, and respectfully prays that the pleadings and proofs, exhibits and decree, in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court proceed to hear the said cause anew, and that the said decree of said circuit court and every part thereof be reversed, and that a decree be made sustaining the said bill, and that the defendants be required to account with and pay to the complainant the profits they have derived from said infringement and the damages they have caused the said complainant by reason of said infringement, and also the costs of this complainant in this court and

on this appeal, and such other decree as to the said Supreme Court shall seem just.

(S'g'd) WETMORE & JENNER,
Solicitors for Complainant and Appellant.

306 (S'g'd) CAUSTEN BROWNE,
WM. A. JENNER,
Of Counsel for Complainant and Appellant.

Appeal allowed.
(S'g'd) E. HENRY LACOMBE.

307 Supreme Court of the United States of America.

PATENT CLOTHING COMPANY, Limited, Compl't & Appellee,
vs.
H. B. GLOVER, JOHN B. GLOVER, L. C. BISSELL, and A. J. PARKER, Composing the Firm of H. B. Glover.

Bond for Damages and Costs.

Know all men by these presents that we, Isaac Oppenheimer, Augustus B. Elfelt, Isaac Wallach, are held and firmly bound unto the above-named defendants in the sum of one thousand ($1,000) dollars, to be paid to the said defendants; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the nineteenth day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-named complainant has prosecuted an appeal to the Supreme Court of the United States to reverse the decision and decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named complainant shall prosecute its appeal to effect and answer all damages and costs if it shall fail to make its said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ISAAC OPPENHEIMER. [L. S.]
AUGUSTUS B. ELFELT. [L. S.]
ISAAC WALLACH. [L. S.]

Sealed and delivered and taken and acknowledged this 19th day of August, 1887, before me—

(S'g'd) PHILLIPS ABBOTT,
[NOTARIAL SEAL.] *Notary Public, Kings Co., N. Y.*

Certificate filed in N. Y. Co.

308 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Isaac Oppenheimer, Augustus B. Elfelt, Isaac Wallach, being duly sworn, severally deposes and says, each for himself, that he is a resident and citizen and freeholder in the State of New York; that he is worth the sum of two thousand dollars over and above all his just debts and liabilities.

(S'g'd) ISAAC OPPENHEIMER.
(S'g'd) AUGUSTUS B. ELFELT.
(S'g'd) ISAAC WALLACH.

Sworn to this 19th day of August, A. D. 1887, before me—

(S'g'd) PHILLIPS ABBOTT,
[NOTARIAL SEAL.] *Notary Public, Kings Co., N. Y.*

Certificate filed in N. Y. Co.

[Endorsed:] Vol. —, page —. U. S. Supreme Court. Patent Clothing Company *vs.* H. B. Glover *et al.* Bond for costs on appeal to U. S. Supreme C't. Wetmore & Jenner, sol'rs for compl't, 206 B'dway, N. Y. city. Bond approved as to form and sufficiency of sureties. (S'g'd) E. Henry Lacombe.

(File-mark:) U. S. circuit court. Filed Aug. 19, 1889. Timothy Griffith, clerk.

309 *Citation — Appeal.*

By the Honorable E. Henry Lacombe, judge of the circuit court of the United States for the southern district of New York, to H. B. Glover, John B. Glover, L. C. Bissell, and A. J. Parker, composing the firm of H. B. Glover & Company:

Whereas the Patent Clothing Company, Limited, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the second circuit and southern district of New York, made in favor of you, the said H. B. Glover, John B. Glover, L. C. Bissell, and A. J. Parker, composing the firm of H. B. Glover & Company, in a suit in equity brought by it against you, and have paid the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the
310 second circuit, in the southern district of New York, the nineteenth day of August, in the year of our Lord one thousand eight hundred and eighty-seven.

(S'g'd) E. HENRY LACOMBE.

(Endorsed:) U. S. circuit court, southern district of New York. Patent Clothing Company, Limited, *vs.* H. B. Glover *et al.* Petition

and citation on appeal. Wetmore & Jenner, solicitors for complainant and appellant, 206 Broadway, New York.

(File-mark:) U. S. circuit court. Filed Aug. 20, 1887. Timothy Griffith, clerk.

311 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to —, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Patent Clothing Company (Limited) against Henry B. Glover and others, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 10 day of September, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the said United States the one hundred and twelfth.

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 363. The Patent Clothing Company, Limited, appellant, *vs.* H. B. Glover, John B. Glover, L. C. Bissell, and A. J. Parker, composing the firm of H. B. Glover & Co. Filed May 14, 1888.

Office Supreme Court, U. S.
FILED,
MAY 1 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 363.

PATENT CLOTHING CO., LIMITED,
Appellant,

v.

GLOVER ET ALS.

IN EQUITY.

BRIEF FOR APPELLANT.

BRIEF.

Rodmond Gibbons, the inventor of a certain improvement in pantaloons and garments of a similar character, obtained Letters Patent of the United States therefor, dated June 6, 1876, which patent was reissued March 22, 1881, and assigned to the appellant.

The appellant brought suit for infringement in the Second Circuit, Southern District of New York, against the appellees, who answered, alleging in defence: (1) That the patent was unlawfully reissued with enlarged claims to cover a different invention from the original one introduced by Gibbons. (2) That the specification of the reissue was insufficient. (3) That the invention described and claimed in the reissue was not new. (4) That it was not patentable in view of the state of the art existing at the date of the original patent. (5) Forfeiture by two years' public use prior to application. (6) Abandonment. (7) Non-infringement.

The cause was heard on pleadings and evidence by Hon. NATHANIEL SHIPMAN, holding the Circuit Court, who decided that the reissue was for a different invention from the original, and, if limited so as to be for the same invention, was not infringed. Upon re-hearing, he again decided that the invention which was the subject of the original patent was not contained in the overalls made and sold by the defendants. He expressed no opinion on any other question in the case.

His original opinion came up as part of the record and is printed with it.

His opinion on re-hearing did not come up with the record, but is printed as an appendix to the brief for appellant.

The decree is alleged to be erroneous in holding that the reissue is for a different invention from the original, or is broader than the original; and in holding that if it be construed the same as the original patent, it is not infringed: and in holding that there is no infringement of the reissue.

The bill is founded upon the Gibbons patent and the Neustadter patent, but the averments in regard to the latter are withdrawn by amendment to be found at page 11 of the record.

The nature of the invention and the construction of the reissue patent.

The original patent of Gibbons contained but one claim, viz.:

"In combination with the fly of pantaloons or similar gar-"ments, an inelastic bridge or check piece, arranged across the "crotch thereof, substantially as described, whereby the strain "at the crotch, when the fly is open and spread apart, is re-"ceived by said bridge or check piece, instead of at the angle "of the crotch itself."

The reissue contains two claims. The first one is substantially the same as the one claimed in the original, and is in the following words, viz.: —

"The combination, with the fly of a pair of pantaloons or "other similar garment, of an inelastic bridge or check piece, "arranged across the crotch of the fly, and operating, sub-"stantially as described, to receive any strain occasioned by "the spreading apart of the fly, and which would otherwise "be exerted upon the crotch of the fly."

The second claim is as follows: —

"In combination with the fly portion of a pair of pantaloons "or other similar garment, a check piece made integral with the "button hole strip of the fly, and adapted to prevent any ten- "sion at the crotch, *d*, that might operate injuriously upon it."

It is manifest that the second claim of the reissue is a claim for a *specific way* of getting the inelastic bridge or crotch piece, and that it is a *limited* claim, as the first claim is a *generic* one.

The second claim is for the described check piece *when* it is integral with the buttonhole strip of the fly; in other words, *when an extension of the buttonhole strip of the fly serves as the check piece.*

It is on this second and limited claim of the reissue that the present suit is brought.

At the same time it will be observed that this specific construction claimed in the second claim of the reissue is referred to in both the original and the reissue patents as the construction which is preferred by the inventor for the purposes of the operation of the check piece.

The description of this preferred construction is in the reissue patent as follows:—

"The lower end of the buttonhole strip *c* is not merely *ex-* "*tended down into* and fastened at the crotch, *d*, *as is the case* "*with the common construction of pantaloons, but bridges over* "*and extends beyond the crotch, d, and is securely stitched to* "*the buttonhole strip a* as shown at *e*."

The operation intended to be performed by the buttonhole strip so extending beyond the crotch is that it shall, as the specification says, "*bridge over and protect from tensional* "*strain the crotch of the said fly.*" And again, "Any extreme

"or sudden distending of the fly that would otherwise tend "to strain and rupture it at the point *e will come wholly upon "the check piece*, which extends across said point, and that "thus *the crotch d is perfectly protected against injury* from "the effects of any such strain."

On looking at *the drawings*, it will be seen that the check piece, under either of the two constructions, is shown as of such length, where it bridges the fly crotch, as to be somewhat less than the sum of the two sides of the triangle which it completes, but it is manifest that this is an immaterial detail. So long as the part which so bridges the fly crotch is *not any longer* than the sum of the two other parts, when the whole is fully spread, no rupturing strain can come upon the crotch seam at the fly. It will and must be taken by the part which so bridges across that seam.

Patentability.

Inasmuch as we proceed in this case only upon the second claim of the reissue, which relates to the construction of the buttonhole strip so that the extension of it shall serve as the bridge or check piece, we wish now to point out the important practical differences between this construction and the use of a separate and distinct check piece.

Either will give protection against rupturing strain upon the sewing at the fly crotch. But the extension of the buttonhole strip for this purpose presents very clear and patentable points of difference and utility.

In the common construction of pantaloons, as the specification says, the lower end of the buttonhole strip is extended down into and fastened in the crotch *d* — that is to say, the three parts, the right front and the left front and the buttonhole strip, are all sewed together in the crotch seam. (See also *Earle*, ans. 35, 36, Record, p. 151.)

The accumulation of so many thicknesses of material in this seam involves serious practical difficulties, both in the adjustment and holding of the parts to be so sewed together, and in the wear of the needle and the thread and of the cloth through which they pass in the act of performing the necessary sewing.

When the bridge or check or stay piece, crossing the fly of the crotch, is a separate and distinct piece of material, such as would be covered by the generic claim of the reissue (the first claim), it is necessary to first form the crotch seam with the buttonhole strip included in it, with the disadvantages to which we have referred, and then to superadd the separate or independent check piece.

But when the buttonhole strip is made to serve as the check piece, which is the special construction patented by the second claim of the reissue, the formation of the crotch seam is much simplified and relieved.

See Deposition of *Weil*, Record, p. 77.

The buttonhole strip no longer enters into the formation of that crotch seam. The numbers of thicknesses of material to be manipulated and adjusted and held in position and sewed through in forming that seam is reduced.

From the foregoing it appears that the invention in question in this case, being the invention covered by the second claim of the reissue, is an improvement in the construction of garments which have a fly-front opening with a right front and a left front and a button hole strip; and that it consists in altering the consruction of the button hole strip and the manner of its combination with the fronts and the crotch seam, so that the buttonhole strip shall serve not only its old purpose of a buttonhole strip, but the additional purpose of a bridge or stay or check piece, while at the same time the

formation of the crotch seam is relieved and simplified by the withdrawal of the buttonhole strip therefrom.

The evidence shows that a change in the construction or form of the buttonhole strip was rendered necessary, when it was proposed to make it do this double duty not only of buttonhole strip but of bridge or check piece.

See Deposition of *Weil*, p. 77 ans. 11, 14.

The invention appears by the evidence to be very useful, to have been largely accepted and introduced by the trade, and to have been *so much preferred to the using of a separate and independent check piece that the latter construction was quite displaced by the former in the manufacture of overalls as much as eight years ago, and has so continued since.*

It is not a question of merely having a piece of cloth laid and fastened across the crotch of the seam to strengthen it or reinforce it against accidental ripping. If we were proceeding on the first claim of the reissue, that question might be presented.

But proceeding, as we do, upon the second claim of the reissue, the question is, as we have stated, of so altering the buttonhole strip and the manner of its combination with the two fronts and with the crotch seam as to make it *serve a new purpose in addition to its original one*, and at the same time to relieve and simplify the formation of the crotch seam.

Such an improvement is clearly patentable.

Considering the subject matter (overalls) in which the improvement is introduced, it would seem to be as important an improvement as any that could well be made.

And it well illustrates the remark of Judge LOWELL in a case where the invention in question was an improvement in a buckle: "In these patents for small articles, slight differ-

"ences are often important: and, if such things are patent-"able at all, it must almost always be in virtue of a *more "useful adaptation to the needs of commerce by small changes "of structure*, which in a great machine might be merely "alternate modes of reaching a part of a general result."

Emerson v. *Howe*, 8 Fed. Rep. 329.

It is evident that there can be no anticipation of this invention by any article which does not contain the two parts of a fly opening and a buttonhole strip, because the very essence of the invention is in *the change made in the construction and use and operation of the buttonhole strip* as part of the fly of the garment.

We, therefore, do not detain the court by extended reference to the numerous articles which have been put in evidence by the defendant, showing that at the date of the patentee's invention it was common to strengthen seams generally by cementing pieces of material across them.

Novelty.

The only articles introduced in evidence by the defendant that seem to call for notice are the Lubin patent and the three rubber coats known in the case as the "Defendants' Ex-"hibit Short Tail Rubber Coat" and the "Defendants' Exhibit "Long Tail Rubber Coat" and the "Defendants' Exhibit "Ferguson No. 1."

As to the Ferguson coat we shall show that the defendants' efforts to prove its manufacture and sale at a date earlier than the plaintiff's original patent has wholly failed.

As to the others, it will be sufficient to quote the testimony of E. S. Renwick to show that they do not at all embody the invention in question here, as we have above defined it.

Mr. Renwick says (Record, p. 32):

"In "Defendants' Exhibit Short-Tailed Rubber Coat" there "is no buttonhole strip, but the buttonhole is made directly "through the material of the body of the garment, and the "stay or bridge piece is a separate piece of cloth which is "cemented fast to the two sides of the opening in the split "of the tail of the garment. This garment has no fly opening, "there being in it no material or piece of material which "corresponds with what is known as the fly in garments "having a fly construction, such piece of material being a "piece wide enough to contain the whole of the buttonhole "or buttonholes, and being attached to the inner side of a "garment which has the part of its body that is outside of "such fly solid, or without a buttonhole or buttonholes, and "adapted to cover and conceal the buttonhole or buttonholes "in the fly and the buttons when they are buttoned into the "buttonholes of the fly."

"In "Exhibit Long-Tailed Rubber Coat" there is a button- "hole strip which is made separate from the body of the gar- "ment and is cemented to the outer side thereof, this button- "hole strip being about an inch and a half in breadth and ex- "tending upward from, at or near to the bottom of the garment "upward beyond the crotch of the split and terminating at "about two inches above that crotch. This buttonhole strip "does not extend across the crotch of the split, and it is not "a fly: moreover, there is no part of the material of the body "of the garment outside of it to conceal the buttonholes or the "buttons when buttoned into such buttonholes. There is in "this garment a stay or check piece to resist a distending "strain at the crotch of the split. This stay, however, is not "a part of the buttonhole strip or integral with it, but is "formed of a narrow piece of fabric of about half the width "of the buttonhole strip, and is at the inner side of that strip.

"This narrow strip is solidly cemented to the buttonhole "strip, and forms what I have understood to be commonly "known as a facing therefor; and the buttonhole cuts "directly through this facing, so that, if the attempt should "be made to attach the inner edge of this facing to the but-"tonhole strip by a continuous seam, that seam would extend "across the buttonhole and prevent a button such as is ap-"plied to this garment from being buttoned in the buttonhole. "This garment has no fly or portion of it corresponding with "what I have stated in the preceding part of the answer as "known as the fly of a garment."

And in regard to the Lubin patent, Mr. Renwick says (Record, p. 33):

"I have examined the Lubin patent, and believe I under-"stand its contents and the construction of the overalls which "are represented and described in it. I do not find in the "Lubin patent either a description or a representation of the "combination with the fly portion of a garment of a check "piece made integral with the buttonhole strip of the fly, "and adapted to prevent tension at the apex of the fly open-"ing, or any structure substantially the same in construction "or mode of operation. There is described and represented "in the Lubin patent the fly portion of a garment, the fly of "which is a buttonhole fly-strip designated *m*; this button-"hole strip, however, is neither integral with a check piece, "adapted to prevent tension at the apex of the fly opening, "nor does this buttonhole strip have anything to do with the "prevention of such tension. On the contrary, the tension at "the apex of the fly opening is prevented by the use of a strip "designated H′ H′, which, instead of being integral with the "buttonhole strip, is a separate piece of material and is not "even connected with the buttonhole strip *m*; so that the

"idea of either constructing a check piece integral with "the buttonhole strip, or of so constructing the buttonhole "strip that it not only performs the function of a buttonhole "strip for the fly portion of a garment but in addition (by "reason of its extension across the apex of the crotch of the "fly opening, and its securement to the opposite side of fly "opening) prevents tension at the apex of the fly portion, is "neither described nor suggested in the Lubin patent."

We now proceed to exhibit to the court a summary of the evidence in regard to the so-called *Ferguson* coat, to show that the defendants have failed to establish, at least with that certainty which the law requires of them, that such coats were made before the date of the plaintiff's original patent.

The defendants having called the officers of the Goodyear India Rubber Glove Manufacturing Company to establish the sale of long tail and short tail rubber coats, air cushions, water bottles, gloves, etc., the manufacture and sale of which complainant admitted by stipulation, afterward recalled the president, a salesman, and two workwomen, former employees of the company, to establish the manufacture and sale of rubber coats like "Exhibit Ferguson No. 1." This was apparently an afterthought or an after-discovery. Complainant claims respecting the Ferguson coat:

1. That the defendants' evidence in support of it fails to establish the matter by a preponderance of evidence, much less beyond a reasonable doubt.

2. Complainant's evidence in reply completely disproves it.

That the defendants' witnesses on this subject were either grossly mistaken or deliberately falsified is quite apparent.

The first witness was Mr. Ferguson (Record, p. 125), at whose examination complainant was not represented and he was not cross-examined. He is a traveling salesman for the

Goodyear Company, and has been since 1866, selling its goods, including coats, "north, south, east, and west" (ans. 4). He identified the long and short tail coat exhibits as "precisely the same" as those he had sold since 1866 (ans. 5). He also produced "Ferguson No. 1" as a specimen of a coat which he had also sold since 1866. The particular attention of the court is called to his 7th, 8th, and 9th answers, it being remembered that the deposition was taken *ex parte*. The witness is able to say "*with certainty*" that he had sold such coats continuously since 1866, because he found them in the stock when he was first employed by the company in 1866, "and ever since that time I have handled and "sold such coats almost daily." In 1866, he says, it was called a cattleman's coat, and he said that he had sold them "continuously from 1866 to the present time throughout the "United States, north, south, east, and west, wherever I "could find customers for them, and during all the time from "1866 to the present time I have sold *thousands* of them."

Mr. Vermeule, the president of the company, being recalled (Record, p. 127), and having before testified respecting the "short" and "long tail coats," the gloves, bottles, etc., was shown the coat "Ferguson No. 1," and identified it as a coat made by his company. That particular exhibit was made within the year (ans. 27). Being asked to produce other coats than the long tail and short tail coats made by his company, he produced the "Ferguson No. 1" (ans. 7), and says that his company had made and sold the coat "made like "this since 1870, and during that time have had them in "stock and on sale continuously" (ans. 8). He says "they "were sold to men who ride on horseback in the cattle busi-"ness, etc., in the south and west. We designated them as "an '*extra long officer's coat*'" (ans. 10), and that they had been sold "from May 1, 1870, to the present time" by "all

"the salesmen in the employ of the company," but he can mention none of the salesmen excepting Ferguson (ans. 11, 12). The coats he is speaking of were made like the exhibit coat "in every particular" (ans. 13), and the back opening was reinforced in the same manner as the exhibit (ans. 17): and he is enabled to state they were made from 1870, because he found them in stock at that date when he went with the company (ans. 18); and being asked to state generally to what extent coats like "Ferguson No. 1" were made and sold by the company from 1870 to the present time, he says: "The numbers sold will run up into thousands" (ans. 19).

It is proper to observe that the witness was not asked by the defendants' counsel to describe the coats other than the long and short tail coats as to which he had before testified; but being asked to produce a specimen of other coats sold by the company, he produced "Ferguson No. 1," which before that had been handed to him by defendants' counsel, and he had examined the exhibit tag attached to it marked "Fer-"guson No. 1," thus being fully informed what the exhibit was (ans. 22 to 24), so that the witness was carefully led to adopt the statements which the salesman Ferguson had made.

If the evidence of Ferguson and Vermeule is true, the inference is at least just that this coat, now called for convenience the "Ferguson" coat, was an article well known and of great popularity, of very extended sale and of special importance in the company's general stock.

In further support of this, Mrs. Ward and Mrs. Benham, workwomen and sisters, and until two years ago employees of the company, were called, who in some respects corroborated Ferguson and Vermeule, but in other respects exposed the poverty of the evidence.

Mrs. Ward (Record, p. 131) was in the employ of the company from 1864 to December, 1884, during all that time

"making rubber coats, cementing seams and putting the goods "together" (ans. 8). She was shown the "Exhibit Ferguson "No. 1," and said she made coats like it in 1864 (ans. 9 and 10), and she "happens to remember coats with loose button-"hole strips and stays like that in the Exhibit Ferguson No. 1" "as early as 1864," from "making reversible coats to be worn "either side, so as that the buttons did not show through" (ans. 12). It may be observed that the Ferguson coat is not a reversible coat, and that a reversible coat, with an independent buttonhole strip either in front or behind, would not be a practical garment. She has known, she says, such coats "as Ferguson No. 1," with a loose buttonhole strip and a stay in the back opening, continually since 1864 (ans. 22).

Notwithstanding the witness' specific testimony respecting the independent buttonhole strip and stay in the tail, it is pretty obvious that the witness did not know what she was talking about. Her business from 1864 was making coats, "cementing the seams, putting together the coat" (ans. 29). She "did not make any different one from this," *i.e.*, "Fer-"guson No. 1," nor did the company make any "different "ones" in those years (ans. 32). There were from 30 to 50 persons working in the room where she worked and all of them worked on these coats, and did the work she did, "ce-"menting the seams and putting together coats" (ans. 32–37). The daily product of these coats was "from 100 to "200" (ans. 37). Its name was "Reversible or Riding coat" (ans. 48), and she continued the work on these goods until ten years ago (ans. 50), when she was hired by the week to instruct in making coats.

She afterwards changes this and states that in 1864 and 1865 the company made five styles of coats, reversible, not-reversible, mountaineer, "Ferguson" and sacks, and she worked on all excepting the sacks (ans. 90–94).

Mrs. Benham (Record, p. 137), a sister of Mrs. Ward (ans. 15), and in the room while the latter was testifying (ans. 20), went into the employ of the company in March, 1863, and remained until six years ago: her work was "making coats and all kinds of garments," "cementing the seams "and putting them together." She worked on reversible coats, mountain coats, firemen's coats, sack coats (ans. 4–6, p. 74). She was asked whether she knew anything "about coats having an opening in the back and having a loose buttonhole "strip and stay," and she said that she had worked on them and that such coats were like "Ferguson No. 2" (ans. 9–11), each step to this conclusion being induced by leading questions. She thinks she made coats the first year she went there and that other employees worked on the same kind of coats and she worked on them as long as she was there (ans. 14). The accuracy of the witness' observation and memory may be gauged from the circumstances that she was unable to say how long her sister worked for the Union Company before working for the Glove Company, whether it was one year or ten years, although she knew at the time (ans. 35–44).

The fair inference from these witnesses would also be that the coats like "Ferguson No. 1" were very largely produced by this company from 1864 continuously down to the present time, and were very extensively sold, Ferguson and Vermeule saying that thousands were sold, and Mrs. Ward saying that the daily product even in 1864 and 1865 was 100 or 200 per day, and from 30 to 50 people working upon them.

The "Ferguson" coat seems to be hardly strong enough for cattlemen's use, and although the long tail slit would be useful for horseback riding, the independent buttonhole strip would not seem to increase its utility but to impair it rather, as lessening its strength and convenience for buttoning, com-

pared with the strength and convenience of having the buttonholes in the main part of the tail and the buttons passing through; and in a "cattleman's" coat, *appearance* at this part would not be important.

It is certainly a finely made and attractive coat, and is, perhaps, as perfect an article of this kind as any.

The company having entered on its manufacture as early as 1864, and "thousands" having been sold continuously "north, south, east, and west," its sale could not have diminished, but must have increased, rather; and yet, the manufacture of rubber coats by this company having been investigated by the defendants or their counsel even before the defendants' answer was filed, and again investigated before Vermeule and Hotchkiss, officers of the company, were examined for the first time in November, 1886, not a word was said about such coats, and the matter was apparently not thought of or discovered until afterwards. This, at least, is a suspicious circumstance.

But besides this, although made in such large numbers and continuously for so long a period, and so many hands having been engaged in their production and sale, excepting these two women, and excepting this single salesman, Ferguson, and the president, Vermeule, not a witness is called who ever saw one, no customer or purchaser testifies respecting it, no specimen of such manufacture prior to 1876 is produced, no record is produced showing either the manufacture or sale of these coats under any name.

Mrs. Benham testified "that when coats were given to her "to make like the 'Exhibit Ferguson No. 1' they were en- "tered in her pass-book"—that is, the pass-book in which the work given her to do was entered—as "so many coats "with fly pieces in the back," and that method of entering them in the pass-book continued down to the time that she

left (p. 143, ans. 101–103). Mrs. Ward also had a pass-book (p. 134, ans. 46) in which these coats were entered, not as "extra long officers' coats," which Mr. Vermeule says was the name by which "we designated them," nor as "cattle-"men's" coats, by which Ferguson says they were known, nor as coats "with fly pieces in the back," which was the method of entering them in Mrs. Ward's pass-book, but as "reversible coats or riding coats," and evidently a misnomer, because "reversible" they could not have been and have a "fly front."

No pass-book, nor pattern book, nor record of any kind is produced to corroborate the oral statements of these witnesses, and yet it could not be possible but that if they spoke truly some such contemporaneous record would show it. Thus, if this coat, "Ferguson No. 1," is shown to-day by any name or number in its books, as must be the case, that name or number could have been traced back to its first use. If change of particulars had taken place owing to change of style or other cause, that was all capable of explanation and demonstration, and by this means purchasers prior to 1876 of these particular "Ferguson" coats could have been ascertained and their evidence produced.

The patterns by which the different parts of a coat are cut, being permanent, are preserved. No old patterns of this coat are produced, and the evidence of these witnesses is entirely uncorroborated, although full corroboration was possible.

And no attempt is made to explain why satisfactory evidence of this was not produced.

Complainant contends that coats like "Exhibit Ferguson No. 1" were not and could not have been made until very recent years, and in support of this produces witnesses who

were in a situation to know of the matter, equal to that of the defendants' witnesses, and we produce the catalogues or price lists of the Goodyear Glove Company from 1875 to 1877, which contradicts what they say.

Mr. Squires (Record, p. 36) was in the employ of the Goodyear Glove Company from 1862 to September, 1885, during the first three years of that period as a cutter of rubber clothing, and thenceforward as superintendent of the clothing department (ans. 2–8). It was he who gave the work to Mrs. Ward in 1864, as she testifies (ans. 44, 45, p. 133). He remembers that the company began at one time to make coats slit up behind further than had been the custom before, the slit being provided with buttons, the short slit being 12 inches and the extra long 18, 24, and 30 inches. This change occurred in 1876, and was brought about by the copying from the English cloth ulster coats, which were worn here by the Englishmen who came over to the Centennial Exhibition.

The new rubber coat did not have a buttonhole behind cut in an independent strip, but they were cut in the garment as is shown in the "Defendants' Exhibit Short-Tail Coat" (ans. 19). The next description of long slit-tail coats that the Glove Company made was called the "Mountaineer," the buttonholes of which behind were cut in the coat in the same manner (ans. 21), and the description of long slit-tail coats were those lined with serges and checks (ans. 22, 23).

And Mr. Squires says that coats like the "Defendants' Exhibit Ferguson's No. 1," with the independent buttonhole strip in the tail were not made by the company for stock while he was there (ans. 30). By "stock" he "means" coats ordered for the store in New York (ans. 29), and he does not remember that any were made for "special order" (ans. 32).

The defendants have offered no evidence that any such coats as "Ferguson No. 1" were made or sold as a "special "order," and as, according to the defendants' evidence, they were made by the hundred every day and continuously for more than twenty years, and sold in "thousands" and "north and south, east and west," they could not be "special "orders," but "stock" goods. It is sufficient for complainant in rebuttal to prove that none were made for "stock," for that is the defendants' assertion. If such coats had been made continuously to the extent and in the quantities and sold as Vermeule and Ferguson say, certainly Mr. Squires, as cutter of rubber clothing and superintendent of the department, and, above all men, the *practical* man, must have noticed it, known it, and have remembered it.

Mr. Squires is confirmed by others.

Mr. Russ (Record, p. 48) went into the employ of the Goodyear Company in September, 1876, and was for two months, or until November 15, assistant bookkeeper, and thereafter and up to October, 1884, was salesman in the retail department. At that time the company had two stores, No. 205 Broadway and 164 and 166 Fulton Street. These were practically one warehouse in the form of an "L," the connection between the two being by an open archway in the rear of 205 Broadway. The Broadway store was used for both retail and wholesale business, and the Fulton Street store was used for the wholesale business only. The wholesale department was removed from Fulton Street to 488 Broadway, corner of Broome Street, in 1877. From the time of this removal the Broome Street store was the main store of the company, but 205 Broadway was continued as a *branch* store where retail sales were made and occasionally sales at wholesale and sales for export. Both Mr. Russ and

Mr. Walker, secretary of the company (Record, p. 54) so state, and it is not contradicted.

Mr. Russ' duties were performed at 205 Broadway and he continued there after the removal of the main store to Broome Street. As house salesman he made sales of goods, and besides this his duties were to keep up the sizes of the stock, make examinations for imperfections, and, when the stock was running short in any line, to make requisitions on the main store to fill the stock up. His duties did not relate to any particular line or part of the stock, but to the stock generally, and in this way he became familiar with all the lines of clothing which the company had from the time of his becoming salesman in November, 1876, thenceforth. His opportunities for observing the particular make or special characteristics of the clothing were, therefore, quite as good as that of Mr. Vermeule, the president, who may fairly be assumed to have been occupied principally in the office, and not among the stock.

Mr. Russ said that in the years 1876 and 1877 the company had no goods *either in stock or on sale*, the tail slit of which was provided with an independent buttonhole strip, such as is shown in "Defendants' Exhibit Ferguson No. 1." "*There was nothing of that kind in stock at that time.*" "The coats carried in stock in 1876 and 1877 had the eleven-"inch opening in the back, and was made of simply one piece "overlapping the other, without any buttons," of which mode of construction the "Complainant's Exhibit Russ Coat No. 1" is an illustration (ans. 10–12).

According to defendants' evidence, coats like "Exhibit Fer-"guson No. 1" were made in very large quantities, 100 or 200 per day. They were sold north, south, east, and west, to the number of thousands, and continuously from 1864 to the present time. The question is not respecting a single

coat, constructed like the exhibit, but respecting a large branch of the manufacture, extending over twenty years.

It would be impossible for such coats to have been sold in such quantities and so general without the witness knowing it and handling many of them every day, and it cannot for an instant be supposed that the manufacture of such goods was stopped prior to 1876 and resumed after 1877, and no such thing is intimated. On the contrary, Mr. Vermeule and Mr. Ferguson say the sale was continuous. It is true that Mr. Russ was concerned chiefly with retail sales, but he took orders for sales at wholesale, and while the main store was in Fulton Street he had access to the wholesale department. It is not unreasonable to believe that all the goods which the company made, or specimens of all, came under his daily observation.

Mr. Walker (Record, p. 54), secretary of the company from 1862 to 1879, had charge of the warerooms of the company in this city. He states the location of the warerooms the same as Mr. Russ, but gives the removal to Broome Street as "about" 1876. He went with the company to the Broome Street store. During his connection with the company he says that he "had a thorough knowledge of all the goods "manufactured or sold by that company" (ans. 6), and again, "I was principally occupied in taking general charge of the "goods, in selling them, looking after the clerks and sales-"men, and having a general oversight of the business of the "company at the depot in this city" (ans. 24), and he states that during his connection with the company and prior to the year 1877, that company did not have in stock or on sale any rubber coats the tail slit of which was provided with an independent buttonhole strip, such as is shown in the exhibit "Defendents' Exhibit Ferguson No 1" (ans. 7). Besides the general duties of Mr. Walker as specified, he also had

charge of the correspondence of the company, although not exclusive charge (ans. 24).

It was, of course, impossible for Mr. Walker to have performed the duties described by him for seventeen years, from 1862 to 1879, and to have occupied the responsible position which he did, without knowing that coats like the "Ferguson No. 1" had been produced by the company to the number of 100 or 200 per day continuously from 1864, and sold to the number of "thousands, north, south, east, and west," if such had been the fact. Before the removal to Broome Street the Fulton Street store was, and after the removal the Broome Street store became, the main depot of the company, from which it was the invariable rule to ship all goods which the company sold; shipments from the factory to purchasers being very rare, if it ever occurred (ans. 25–28). Mr. Walker showed, even after the lapse of eight years since he left the company, his familiarity with the goods which they made and sold by describing in detail a large number of them (ans. 33).

Mr. Hodgman (Record, p. 51), secretary of the Hodgman Rubber Company since its incorporation in 1885, and before that superintendent of the mills of Hodgman & Co., the predecessor firm, having a factory at Tuckahoe and Mt. Vernon, New York, with warerooms in Maiden Lane, New York city, testified that he had acted as superintendent of the mills for twenty-one years continuously, excepting the year from May, 1872, to May, 1873. The business of the company during that period has been principally the manufacture of rubber clothing and he considers his company to be among the largest manufacturers in that line, and the company and its predecessor firm has regularly dealt in other rubber goods besides those of their own make. Mr. Hodgman stated that he was not aware of there having been on the market in the year 1876, or prior thereto, rubber coats the tail slit of which was pro-

vided with an independent buttonhole strip, such as there is in "Defendants' Exhibit Ferguson No. 1," and he thinks that if the Goodyear Rubber Company had made and sold coats having tail slits provided with such independent buttonhole strips and had kept them in stock and sold them regularly from 1872 down to the year 1877, he would have known of it (ans. 11, 12).

There should be taken into account the keenness with which a manufacturer looks for the products of his competitors and his swiftness to avail of all good points thus discovered. It is incredible that the Goodyear Company should have made and sold "north, south, east, and west," and to the number of "thousands" and hundreds every day, coats like "Ferguson No. 1," and from 1864 down to 1877, and Mr. Hodgman not have become acquainted with the fact. It would suggest an imbecility in the superintendent and the proprietors of the Hodgman concerns, firm and company, which would have prevented the witness from ever having become superintendent, and the firm or company from ever having become extensive manufacturers.

But the matter is disposed of beyond the possibility of any reasonable doubt by the complainant's production of the "catalogues" or Goodyear "price lists."

Mr. Keeler (Record, p. 60), a printer in the employ of Perris & Brown for nearly twenty years, succeeded that firm in its job printing business in 1883, and thus became possessed of the sample book "Sundries 2, P. & B." which Perris & Brown had kept, and which remained in the possession of Mr. Keeler from the time of his succession in 1883 to the day of its production in this case (ans. 3–15).

Mr. Perris (Record, p. 62), of the firm of Perris & Brown, formerly job printers, recognized the book of samples "Sundries 2, P. & B." as a book in which they pasted samples of

printing done by them from time to time. The samples were pasted in by himself and partners. The firm had kept a sample book for bill heads, another for note and letter heads, another for address and fancy cards, a large book for posters and hangers, and the book produced for sundries and miscellaneous work. These samples were pasted in substantially at the time the printing was done and in their regular order. The book may not contain everything in this branch printed by the firm, but was intended to be complete. It is a large book containing, as an estimate, a thousand pages, each of them well filled, and contains samples from October, 1871, to March, 1878. From this book Mr. Perris detached certain price lists, which complainant has put in evidence as catalogues, numbers 1 to 4, inclusive, and which had been attached to the blank sheets of the sample book by paste. No. 1 was printed about December 9, 1875, and bears date December 1, 1875. No. 2 was printed October 4, 1876, and bears date October 1, 1876. No. 3 was printed about March 13, 1877, and bears date March 1, 1877. No. 4 was printed about November 19, 1877, and bears date November 15, 1877.

All of these lists, excepting the last, relate to rubber clothing. There were other price lists printed by Perris & Brown for the Goodyear Company, of which one was in 1873 for rubber toys, and another in the same year for rubber combs, and still another in the same year for druggists' articles.

The defendant in cross-examination sought to prove that the witness' firm of Perris & Brown did not do all of the printing of the Goodyear Company during that period, and this the witness did not deny. Indeed, it is highly probable that other lists were printed by other printers, one or more in the years from 1864 and thenceforward.

Referring now to the lists 1, 2, and 3, we find that these relate to "Zephyr Goods," of which, among men's coats only three kinds are described in any of these lists, viz., "sack coats, long" at $10, "Talmas" at $9, "Ulsters" at $12. These coats are illustrated in the list No. 3, where the pictures show what they were. The fronts of the coats only are shown, but none of them have an independent buttonhole strip in front. In each of them the buttonholes are in the body of the coat, allowing the buttons to appear.

Mr. Squires testified that *if there was no independent buttonhole strip in front, there would not be an independent buttonhole strip in the tail slit.* "They would not look right "made that way" (ans. 35, p. 38). This is not contradicted.

Mr. Russ was recalled (Record, p. 67) and recognized and identified the catalogues, and stated that the sack coats, talmas, and ulsters mentioned in the lists Nos. 1 and 2 were the same as those illustrated in the list No. 3 (ans. 4). The list No. 1 was in force when he went into the employ of the company (ans. 6), and he stated respecting all of them that none of the coats mentioned in either of the catalogues had any independent buttonhole strip either in front or in the tail (ans. 9), which, indeed, is apparent from an inspection of the pictures.

Mr. Russ also produced a catalogue or price list of the company which he had himself kept. This is "Complainant's "Exhibit Goodyear Catalogue No. 5." It is much more full than the others, both in respect of illustration and description. This catalogue does not bear any date, and precisely when or by whom it was printed we do not know, but Mr. Russ said that it was published in 1877 or 1878 (ans. 13). It was certainly as late as 1877, because on the cover is printed the company's place of business as 488 Broadway, corner Broome Street, to which place the company moved in the spring of 1877.

On page 3 of this list are pictures of the "sack coat, short," the "officer's coat, long, "the "ulsters" and the "fireman's coat." On page 5 are pictures of the capes. On page 15 are pictures of the sack coat, talmas and ulsters, zephyr goods, and as the same were mentioned and illustrated in the prior catalogue exhibits. This catalogue, No. 5, seems to be a very full catalogue, is entitled upon its cover, "Price List of Rubber Clothing, Gloves and Dress Shields, manufactured by Goodyear Rubber Mfg. Co. and Goodyear's India Rubber Glove Mfg. Co." It may be presumed to be a full and complete list of the rubber clothing which those companies were making and selling at that time, and it certainly seems to be such. It is very full in description and all prices are stated.

Nowhere in it is to be found either illustrated, described or in anywise named, designated or referred to, any such coat as is the Ferguson No. 1, or any "officer's coat, extra long," "mountaineer's" coat or any "cattleman's" coat. If coats like Ferguson No. 1 had been produced by either of these companies from 1864 to the present time continuously, and to the number of 100 or 200 daily, and had been sold in "thousands" "north, south, east, and west," why is not some reference to them contained in this complete catalogue? A garment so popular and of such wide sale could not have been omitted by accident, and there is no intimation that the company had stopped selling it at that time. On the contrary, Mr. Ferguson and Mr. Vermeule and the two women say that their manufacture and sale were continuous. On page 3 we find that all the coats there shown, including the "sack coat, "short" and the "officer's coat, long" have no independent buttonhole strip, but the buttons show through. The fronts only are represented, *but if there was no independent buttonhole strip in front there would be none behind* (ans. 34, 35, Record, p. 38), and so with respect to the capes pictured on

pages 5 and 7, and so with respect to the "Zephyr" goods, sack coats, talmas, and ulsters pictured in page 15.

Mr. Vermeule says that the coats like Ferguson No. 1 were designated "extra long officer's coat" (Record, p. 128, ans. 10). The officer's coat, *long*, is illustrated on page 3, but it is not the Ferguson coat. The prices of officers' coats are stated on pages 4, 6 and 8, varying according to the finish and inside cloth lining, but no "*extra* long officers' coats" are mentioned, and if there had been such at that time, why were they not mentioned? Mr. Ferguson said that they were known as "cattlemen's" coats in 1864 (Record, p. 126, ans. 9), but although officers' coats, reefing jackets, fishermen's jackets, wading pants, lumbermen's pants, boys' coats, etc., in great variety are mentioned, there are no "cattlemen's" coats referred to. Mrs. Ward and Mrs. Benham speak of "mountaineers'" coats, made in 1864, but none such are referred to in the catalogue.

It is impossible to resist the conclusion that if a coat such as Ferguson No. 1 had been made by the Goodyear Company it would have been illustrated in this price list. That coat has an independant buttonhole strip in front. No such coat is pictured in the list. If defendants' witnesses were mistaken about the coats in their minds having an independent buttonhole strip in front, may they not also be mistaken about the independent buttonhole strip behind.

The consideration that a coat without such a strip in front would also be without it behind, a point not contradicted, is decisive of the matter. *There would be an incongruity, an absence of purpose and utility in such a construction as to forbid it.*

The only coat of the Goodyear Company having an independent buttonhole strip was that of which the "Complainant's Exhibit Russ No. 1" is a sample. This was made in

1876 and 1877 and was "considered their most improved "ones" (Record, p. 49, ans. 12), and such coat Mr. Walker purchased for his own use in 1879, just before leaving the company (Record, p. 60, ans. 45). He produced the coat at the hearing; it was identical with the Russ No. 1 made perhaps at the same time, and was still serviceable (ans. 48). That coat has an independent buttonhole strip in front, but none behind; there the parts overlap merely in the ordinary manner. This coat is the "London coat" mentioned among the "extra fine clothing" on page 10 of the price list No. 5, that catalogue coming out probably in 1877, and the "Lon-"don" being made first in 1876 or 1877; there was probably not time to illustrate it in the catalogue.

Besides the grave discrepancies between Ferguson and Vermeule, the uncertainties of Mrs. Ward's observation and memory may be briefly noted. In describing a reversible coat (Record, p. 134), she says it had two sets of buttons (ans. 56), one inside and one out (ans. 57); twelve buttons in all (ans. 59); but only one set of buttonholes (ans. 58); or six in all (ans. 64); the six buttonholes all on one side (ans. 67); these six buttonholes in the coat body (ans. 68); there were *two* fly pieces; she is *sure* of it (ans. 75 and 76); both on the same side (ans. 77); and no change ever made in that method of construction (ans. 78 and 79). She describes a ridiculously impractical construction, as is shown by the "Exhibit Hodgman Illustrative Exhibit" (Record, p. 52, ans. 14), which we had made according to her description for the purpose of demonstrating her inaccuracy. Mr. Hodgman said, respecting such a coat, that it was not merchantable, "because it could not be buttoned without mak-"ing a bungling garment" (Record, p. 53, ans. 17–20).

It appears, therefore, that notwithstanding the assertion of Vermeule and Ferguson, Mrs. Ward and her sister, Mrs.

Benham, that such coats were made continuously from 1864 to date, and in very large quantities. Mr. Squires, at first cutter and afterwards superintendent of the clothing department, Mr. Russ, salesman, Mr. Walker, secretary, salesman and manager of the main New York store, knew nothing whatever about it, and the full catalogue No. 5 produced gives no indication of it. If the complainant's witnesses are wrong, how easy to select from the thousands of persons who as manufacturers, as working people, sellers, purchasers, dealers and wearers of these goods, to have convicted them of the error. The production of a single garment sold prior to 1876, corresponding to Ferguson No. 1, would have done it; but besides that, it could have been shown by records, catalogues, price lists, pass books, order books, design books, pattern books, or whatever else contained any designation of them. If there were any lists published before 1877, referring to a cattleman's coat or a mountaineer's or an extra long officer's coat, why not have produced them? The company must have preserved specimens of these lists, and the fact, if it existed, was susceptible of demonstration in another way. The catalogue No. 5 informs us by picture what an "officer's coat, long," was. Mr. Russ says that when he wanted goods at 205 Broadway, either to fill a sale or keep up his stock, he filled out an order blank or requisition and sent it to the main store either at 164 Fulton Street or 488 Broadway, corner of Broome, and Mr. Walker said that requisitions were sent from the New York office to the factory at Naugatuck, and Mr. Squires, the superintendent, said that when new styles of garments were ordered to be made for stock, the description of the article wanted was written in the order-books at the factory (Record, p. 39, ans. 46). But nothing of this sort was shown, and no attempt made to show it.

The defendants having failed to produce the Goodyear books, the complainant attempted to show by their books the falsity of the statements made by Mr. Vermeule and Mr. Ferguson, and subpœnaed Mr. Vermeule to produce the books for that purpose; but he refused to produce them, claiming that neither he nor any one else had the right to produce them (Record, p. 28), but it appears that Mr. Glover had access to the factory clothing order books and examined them, and Mr. Squires was sent for by the company to facilitate Mr. Glover in such examination (Record, p. 38, ans. 39–45).

Every inference arising from the non-production of the books is against the defendants.

The Burden of Proof and Rule of Law.

The rule of law applicable to this issue of anticipation is well settled; not only is the burden of proof to make good this defence upon the party setting it up, but it has been held that every reasonable doubt should be resolved against him.

Cantrell v. *Wallick*, 117 U.S. 689, at 696.
Coffin v. *Ogden*, 18 Wall. 120, at 124.
Washburn v. *Gould*, 3 Story, 122, at 142.

In *Cantrell* v. *Wallick* (*supra*), two witnesses testified as to moldings enamelled by a certain box. Four others engaged in the same factory testified that the particular contrivance was not used in the box, and the Supreme Court said: "The defendants have therefore failed to show by preponderance of proof, much less beyond reasonable doubt, the prior use on which they rely; on the contrary, the weight of the evidence is against this defence."

In *Shirley* v. *Sanderson*, 8 Fed. Rep. 905, the rule is stated thus, BLATCHFORD, J.: "It is contended for the defendant "that the positive testimony of Mayer and of Russell ought "to outweigh the negative testimony in reply. The burden "of proof is on the defendant to establish affirmatively the "defence of want of novelty beyond a reasonable doubt."

In this case Mayer and Russell testified to the manufacture of "*thousands* of dozens of lamp chimneys" containing the patented invention, but none of the old chimneys were produced, or any books or papers containing any record evidence as to their shape, and no testimony of any customers who had bought them. Three dealers, familiar with the trade, testified to never having seen such, and two workmen in the factory where it was claimed they were made testify that they were not made. This "negative evidence" was allowed to outweigh the defendant's proof and the patent was sustained.

The rule is so well established that it is not deemed necessary to cite further authorities in support of it. The present case seems to be conspicuously one in which the defendants have failed to establish even by preponderating proof, much less beyond a reasonable doubt, the manufacture of coats prior to 1876 by the Goodyear Company containing an independent buttonhole strip. Such manufacture is asserted by the travelling salesman Ferguson, and by the president Vermeule, and in a doubtful and uncertain answer by Mrs. Ward and Mrs. Benham, but they are corroborated by no record evidence, and no attempt is made to produce an article claimed to have been made or sold prior to that year. Although the case is one where, if the fact were as asserted, it would be susceptible of overwhelming evidence, both by records and oral, such as makers, sellers, dealers, with records of the manufacture and sale. The fact is contra-

dicted by the cutter and superintendent, Mr. Squires, the salesman, Mr. Russ, and the secretary, salesman and manager, Mr. Walker, and by the company's catalogues, and by Mr. Hodgman, a rival manufacturer in the same trade. While the company's books are shown to Mr. Glover, the production of them in proof is refused to complainant, notwithstanding subpœna.

One further comment is worth making. It would seem that after Mr. Russ and Mr. Walker had been examined, the defendant conferred with Mr. Vermeule respecting their evidence, and when Mr. Russ was recalled to testify respecting the price lists he was asked by the cross-examiner whether he had not been discharged from the company for dishonesty (Record, p. 70, ans. 37). The question was duly objected to. No attempt was made to shake his testimony in chief by legitimate cross-examination, but as a substitute for it there is improper inuendo. Mr. Russ' evidence had been reported to Mr. Vermeule, and this was the only answer he had to make to it. This amounted to confession. If the fact were that Mr. Russ had been discharged for dishonesty, he, still in the rubber goods business and dealing with the Goodyear Company, would have been the last to deny the existence of the Ferguson coat or have taken the risk of being confronted with even one of the many thousands said to have been sold.

See Depo. of Earle, Record, p. 154, ans. 46–50.

The validity of the reissue—the improvement claimed in the second claim being fully described in the original patent, and the reissue being not broader but narrower than the original.

The drawings of the original and reissue are identical—we here print the two specifications in parallel columns:

ORIGINAL.

To all whom it may concern:

Be it known that I, Rodmond Gibbons, of the city of San Francisco in the State of California, have invented a new and useful improvement in pantaloons, and garments of a similar character, of which the following is a specification, reference being had to the accompanying drawing, forming a part hereof.

My invention relates to a fastening for the crotch in the fly of pantaloons or similar garments; and it consists in bridging said crotch with a check piece of cloth or other inelastic pliable material, as hereinafter fully described.

The object of this invention is to prevent that tension at the crotch ordinarily produced either by continued use of the garment, or by any undue strain caused by the assumption by the wearer of any posture of the body, or by the removal of the garment calculated to produce such an effect.

The said improvement is

REISSUE.

To all whom it may concern:

Be it known that I, Rodmond Gibbons, of the city of San Francisco in the State of California, have invented certain new and useful improvements in pantaloons and other garments of a similar character; and I do hereby declare the following to be a full, clear and exact description thereof, reference being had to the accompanying drawings, forming part of this specification.

My invention relates to means for strengthening the crotch in the fly of pantaloons, and has for its object to prevent that tension at the crotch of the fly which is ordinarily produced, either by continued use of the garment or by some undue strain upon the latter, caused by the assumption of some posture by the person wearing it or by some mode of removal of the garment from the body calculated to produce such an effect, and which tension frequently operates to rupture

applicable to all descriptions of pantaloons and garments of a similar character, its application to the garment adding greatly to its durability, by preventing the stretch of the cloth or stitching at the crotch.

To enable persons skilled in the art of manufacturing the garments to which my invention is adaptable, I describe the same as follows, referring to the annexed drawing.

[Here follows diagram.]

Figure 1 is a view of the upper part of a pair of pantaloons, the front of the fly being turned down, so as to show the application of the improvement. Figs. 2 and 3 are, respectively, edge and face views, on an enlarged scale, of the fly extended so as to show the attachment of the improvement. Fig. 4 shows a modification in construction.

In Figs. 1, 2, 3, the button strip of the fly is represented by *a*, and the buttons by *b*. The buttonhole strip is indi-

either the cloth or the seams, or both, at the vicinity of the said crotch.

To this end my invention consists in the use, in connection with the fly, of a check piece or strip of cloth or other inelastic pliable material, arranged to bridge over and protect from tensional strain the crotch of said fly, as will be hereinafter more fully described.

My said invention may be employed in the manufacture of all descriptions of pantaloons and other garments of similar character, its application to such garments adding greatly to the durability of the fly portion thereof by preventing any stretch of the cloth or rupture of the stitching at the crotch of the fly.

To enable those skilled in manufacturing that kind of garments to which my invention is applicable to make and use them with my said invention embodied therein, I will now proceed to more fully describe it, referring by

cated by *c*, and between the buttonholes it is stitched to the front of the garment in the ordinary way. The lower end of the buttonhole strip does not extend down and fasten into the crotch, *d*, as in the common construction of pantaloons, but bridges over the crotch, being securely stitched at *e* to the button strip *a*. The buttonhole strip is also firmly secured at *f*, below the lower buttonhole.

Fig. 4 shows, instead of the preferred construction exhibited in the other figures, a separate piece of cloth serving as the bridge or check piece. This construction I deem to be within the scope of my invention.

My improvement, as seen in the manner preferred by me, adds nothing to the cost of the garment, but rather cheapens its manufacture, by causing the attachment of the lower end of the buttonhole strip to be made at a point more easily reached than that at which the connection is ordinarily made.

letters to the accompanying drawings, in which —

[Here follows diagram.]

Figure 1 is a front view of the upper part of a pair of pantaloons representing the front of the fly as turned down for the purpose of more clearly illustrating the application thereto of my invention. Figs. 2 and 3 are, respectively, edge and face detail views of the fly portion only of the garment, drawn on an enlarged scale and with the fly distended, in order to more plainly show the improvement added thereto.

At Fig. 4 is shown a modified construction, in which the check piece, instead of being integral with the buttonhole strip, is composed of a separate piece of cloth.

In Figs. 1, 2, and 3, the buttonhole strip of the fly is represented by *a* and the buttons by *b*. The buttonhole strip is indicated by *c*, and between its buttonholes it is stitched at points to the front of the garment in the ordinary way. The lower end of the

Having described my invention, what I claim as new, and wish to secure by Letters Patent of the United States, is —

buttonhole strip *c* is not merely extended down into and fastened at the crotch, *d*, as is the case in the common construction of pantaloons, but bridges over and extends beyond the crotch *d*, and is securely stitched to the button strip *a* as shown at *e*. The said buttonhole strip is also very firmly secured to the garment below the lowest buttonhole strip as indicated at F.

At Figure 4 is shown, instead of the preferred form of my invention, a construction in which a separate piece of cloth, c^2, serves as the bridge or check piece. This construction I consider as involving the broad scope of my invention; for although in this form the buttonhole strip has its lower end secured at the crotch, *d*, the latter point is relieved of all strain when the fly is pulled open by the piece c^2, arranged as shown.

My improvement in the specific form seen at Figs. 1, 2, and 3, which show it carried out in the manner pre-

ferred by me, adds nothing to the cost of the garment, but, instead, rather cheapens its manufacture, since its attachment to the garment of the lower end of the buttonhole strip is effected at a point more accessible than that at which the connection by stitching has heretofore been made.

It will be seen that in a pair of pantaloons made according to my invention, carried out in either of the forms shown, any extreme or sudden distension of the fly that would otherwise tend to strain and rupture it at the point *d* will come wholly upon the check piece which extends across said point, and that thus the crotch *d* is perfectly protected against injury from the effects of any such strain.

Having now fully described my invention in both the shown forms in which it may be practised, what I claim as new, and desire to secure by Letters Patent, is —

In combination with the fly of pantaloons or similar gar-

1. The combination, with the fly of a pair of pantaloons

ments, an inelastic bridge or check piece, arranged across the crotch thereof, substantially as described, whereby the strain at the crotch, when the fly is opened and spread apart, is received by said bridge or check piece, instead of at the angle of the crotch itself.

or other similar garment, of an inelastic bridge or check piece arranged across the crotch of the fly, and operating substantially as described, to receive any strain occasioned by the spreading apart of the fly, and which would otherwise be exerted upon the crotch of the fly.

2. In combination with the fly portion of a pair of pantaloons or other similar garment, a check piece made integral with the buttonhole strip of the fly, and adapted to prevent any tension at the crotch *d* which might operate injuriously upon it.

Judge SHIPMAN says, in his opinion, page 175. —

"The question which first presents itself is whether, under "a proper construction of the reissue patent, it should not be "confined to a bridge or check piece which is arranged across "the fly-front and bridges over and is not fastened at the "crotch."

We say that the reissue should be confined to exactly such a bridge piece as the original patent is confined to, and also confined (as the original is not) to such a bridge piece when it consists in an extension of the buttonhole strip.

Judge SHIPMAN proceeds: "I am clearly of opinion that

"the invention of the original patent, as described and claimed "therein, was a piece of inelastic, flexible material, arranged "across the crotch as a bridge, with its two ends secured to "opposite sides of the fly front, at points so far down the "two sides that when a strain is brought thereon the bridge "will take the entire strain. The original specification, draw- "ings and claim show that the bridge was the invention for "which the patent was applied for, and that any other inven- "tion is beyond its terms. It is also the invention of the "first claim of the reissue. The second claim of the reissue "was designed to include a check piece which is not only in "tegral with the buttonhole strip, but which extends down to "and is fastened at and crosses the crotch of the fly and "thence extends up upon the other side of the fly and is fast- "ened to the button strip."

To all this we perfectly agree.

Then Judge SHIPMAN says, "This is not the invention of "the original patent, which expressly said that the button- "hole strip when serving also as a bridge does not extend "down and fasten into the crotch."

Here Judge SHIPMAN is in error. The original patent and the reissue patent say the same thing about the bridge piece fastened into the crotch; they include the same thing and exclude the same thing. Judge SHIPMAN, we submit, was led into his error by misreading a particular sentence in the original specification, as we shall presently show.

He adds, "The second claim of the reissue is invalid unless "it is limited to the bridge or check piece of the original "claim."

We say that it is so limited, and is not invalid.

Judge SHIPMAN nowhere explains wherein the reissue specification and the original specification differ in describing the check piece. He nowhere points out or refers to any language in the reissue description which differs from that of the original and which makes the reissue cover what the original did not. We have his opinion that it does, but he gives us absolutely no reasons for that opinion.

We obtained a rehearing, and at that time, in order to meet the severest test that could be imposed upon us, we argued the question of infringement as a question of the original patent; submitting to judgment against us if we did not show that the defendants infringed the original patent just as it stood. Judge SHIPMAN, however, adhered to his opinion.

We must now examine the two specifications, original and reissue, and see if there is any substantial difference between them, except that the reissue second claim, on which we rely, is narrowed by introducing the requirement that the check piece consists of an extension of the buttonhole strip.

When two trained professional experts on opposite sides of a patent cause agree upon a certain proposition, it may be usually regarded as hopelessly true.

The experts in this case agree that there is no difference between the original and reissue as to the description of the invention.

Mr. Earle says, at page 104 of the Record, "the illustra-"tion of said patent" (meaning the reissue) "is substantially "the same as that of the original patent, and as I understand "it, *the specification describes the same invention as that de-"scribed in the original patent.* I take into consideration the "fact that the paragraph beginning at line 63 in the specifi-"cation of the reissue is somewhat changed from the original, "as will appear by a quotation from the two in the following

"parallel columns." (The difference between the two columns is that one says that the buttonhole strip "does not extend "down and fasten into the crotch *d*," and the other says that "it is not *merely* extended down into and fastened at the "crotch *d*)." He goes on to say: "I don't understand the "introduction of the word 'merely' to imply that the strip "*is* extended down into the crotch; that is to say, that it is "used in the sense of *not only;* but, on the contrary, that "the word 'merely' is necessarily used to emphasize the fact "that the old construction was a mere pretence of strength, "that is to say, if the buttonhole strip is extended down into "the crotch, it is insufficient to withstand the strain which "may be brought upon it."

Mr. Renwick, called by the complainant, says on page 26 of Record: "I do agree with him (Mr. Earle) in the respect "that the first claim of the reissue patent recites substantially "the same invention which is recited in the claim of the orig- "inal patent." And later he says, on page 29, in regard to the word "merely," that it appears to him to be used in the same sense as the word "simply," and on the same page he says: "As I understand the description of the two patents "referred to, they draw the same distinction between the "common construction of pantaloons and the new construc- "tion which is made by the inventor; the distinction being "that in the new construction the lower end of the buttonhole "strip *extends beyond the crotch and is stitched to the but- "ton strip*, whereas with what is spoken of as the common "construction of pantaloons there was no extension of the but- "tonhole strip beyond the crotch, and no stitching of any "extension of the buttonhole strip to the button strip."

Mr. Earle also says (p. 104 of Record): "The first claim "of the reissue is the single claim of the original patent, the "slight changes in expression in no way qualifying the claim "as I understand it."

It appears, then, that as to the only question that was made in the testimony of any difference of phraseology, the experts agree that that difference is immaterial.

But as it seems that it must have been upon this difference of phraseology that Judge SHIPMAN based his judgment of difference between the original and reissue, we will examine it closely.

Judge SHIPMAN considers that if the buttonhole strip, which crosses the crotch of the fly and extends up upon the other side of the fly and is fastened to the button strip, is *stitched* down at the crotch of the fly, it is included by the reissue and excluded by the original; that the check piece of the original patent must have an open space under it (some clear space, no matter how little) at the point where it crosses the fly-crotch; and that if this space is closed up by tacking the check piece to the fly-crotch by a few stitches (as is done by the defendants) it is outside of the invention and of the original patent, but included by the reissue.

The passage to which it must refer is that as to which the experts agree that there is *no* difference between the original and the reissue.

We give it in parallel columns.

ORIGINAL.	REISSUE.
"The lower end of the buttonhole strip does not extend down and fasten into the crotch, *d*, as in the common construction of pantaloons, but bridges over the crotch, being securely stitched at *e* to the buttonhole strip *a*."	"The lower end of the buttonhole strip *c* is not merely extended down into and fastened at the crotch, *d*, as is the case in the common construction of pantaloons, but bridges over and extends beyond the crotch *d*, and is securely stitched to the button strip *a* as shown at *e*."

Now when the original specification says that the buttonhole strip "does not extend down and fasten into the crotch, "*d, as in the common construction of pantaloons,*" but bridges "over the crotch," etc., it means, as has been heretofore explained, that it is not extended down into the crotch so as to form a part of the crotch, *and there stop*, leaving the crotch liable to rip as before — which was "the common construction "pantaloons."

And when the reissue says "the lower end of the button- "hole strip is not *merely* extended down into and fastened "at the crotch, as is the case of the common construction "of pantaloons, but bridges over and extends beyond the "crotch," etc., it means exactly the same thing. "Merely" means that it does not *stop there*.

So the experts agree, and this is the common sense reading of this paragraph.

We submit, then, that the reissue is for the same invention as the original, only *limited*, as to the second claim of the reissue, to a check piece, so constructed and operating, *when* it is formed, by extending the buttonhole strip as described.

And we now come to the question of —

Infringement.

So far as the record shows, Gibbons was the first man that improved the construction of garments having a fly-front, by having *the buttonhole strip* which makes part of such a garment *extended across the crotch of the fly and made fast on the other side of the crotch to the button strip, so as to serve not only the purpose of a buttonhole strip, but the additional purpose of a check piece or stay-piece to prevent rupture at the crotch of the fly.*

Let us see if the original patent does not describe and claim

this improvement in such terms as to cover as an infringement the Glover overalls manufactured and sold by the defendants.

The patentee begins by saying: "My invention relates to "a *fastening* for *the crotch in the fly* of pantaloons or similar "garments, and it consists in *bridging* said crotch with a "*check piece* of cloth or other inelastic pliable material, as "hereinafter fully described. The object of this invention is "to prevent that tension at the crotch ordinarily produced "either by continued use of the garment or by any undue "strain caused by the assumption by the wearer of any post-"ure of the body, or by the removal of the garment, calculated "to produce such an effect. The said improvement is ap-"plicable to all descriptions of pantaloons and garments of a "similar character, its application to the garment adding "greatly to its durability by preventing the stretch of the "cloth or stitching at the crotch."

Translated into common English, this means that, whereas a man in putting on or taking off his trousers, or in carelessly opening them at the front, or by some other movement of his body, is apt to bring such a strain upon the crotch of the fly as to stretch the cloth or the stitching at that point, the inventor proposes to protect the crotch of the fly against such accident by "*bridging the crotch with a check piece* of "cloth or other inelastic material, as hereinafter fully des-"cribed."

His *description* of his device is as follows: "The lower "end of the buttonhole strip does not *extend down and fasten* "*into* the crotch, *d*, as in the common construction of panta-"loons, but *bridges over the crotch*, being securely stitched "at *e* to the button strip *a*. The buttonhole strip is also "firmly secured at *f*, below the lower buttonhole." [This construction is shown in all the figures of the drawing except figure 4.] "Fig. 4 shows, instead of the preferred con-

"struction exhibited in the other figures, *a separate piece of* "*cloth* serving as the bridge or check piece. This construc- "tion I deem to be within the scope of my invention."

And his *claim* is, "in combination with the fly of pantaloons "or similar garments, an inelastic *bridge or check piece*, "*arranged across the crotch thereof, substantially as described*, "whereby *the strain at the crotch*, when the fly is opened and "spread apart, is *received by said bridge or check piece, in-* "*stead of at the angle of the crotch itself*." Of course it will be remembered all the time that this claim covers *more* than the second claim of the reissue; it covers the check piece bridging the crotch, whether it consists in an extension of the buttonhole strip across the crotch or in applying a separate piece of cloth across the crotch. But the present question is, does it not cover the check piece bridging the crotch when consisting in an extension of the buttonhole strip across the crotch — or, as the second claim of the reissue expresses it, "made integral with the buttonhole strip" — and what are the *essentials* called for by such claim.

Now in this patent, as in all patents, the language of the patentee in describing and claiming his invention is to be construed so as to cover and secure to him the substance of his invention without regard to immaterial differences.

The patentee says, "the lower end of the buttonhole strip "does not extend down and fasten *into* the crotch, *d*, *as in* "*the common construction of pantaloons*, but bridges over the "crotch, being securely stitched at *e* to the button strip *a*. "The buttonhole strip is also firmly secured at *f*, below the "lower buttonhole."

What is "the common construction of pantaloons" in this respect? The lower end of the buttonhole strip extends down into the crotch *d* and *makes part of the seam of the crotch*, being there sewed together with the lower ends of

the right front and of the left front for the purpose of forming that seam. The lower end of the buttonhole strip *stops there in the crotch*. It does not cross the crotch at all. It is "merely" fastened into the crotch.

Now in such a construction it is evident that a violent spreading apart of the fly will bring a strain upon the sewing at the crotch, which will be liable to rupture it. And the described object of the invention is to provide a "fastening" for the crotch which shall "prevent that tension at the crotch," and so prevent "the stretch of the cloth or stitching at the "crotch," "the strain at the crotch" being received by the described bridge or check piece, which "bridges over the "crotch" and is fastened on either side of it, instead of the strain being received "at the angle of the crotch itself."

It happens that in the drawings, Figs. 1, 2, and 4, there appears a free and open space under the check piece where it crosses the crotch. It would have been difficult to make such views as these figures intelligible without such a free and open space. But not a word is said about it in the specification, unless indeed it is implied in the word "bridge," as to which a few words hereafter. It is manifest that the bridge or check piece will have exactly the same operation to protect the crotch from the injurious strain in question, whether there be such free or open space or not, so long as the strain comes upon and is taken up by the bridge or check piece. It is a question of *practical operation*, not of mere form or proportion.—

On the rehearing, Judge SHIPMAN being invited by us to try the question of infringement as a question of infringement on the original patent, he reached the conclusion that there was no infringment by the following reasoning:

"The natural construction of the specification is that, when

"the patentee described a bridge which was arranged across "the crotch of a fly, he meant a brace or stay which crossed, "and did not go around, the apex of the fly-front. A differ- "ent construction would not occur to the reader, until he "learned the fact that such a construction had been suggested, "or that it might be desirable. The idea which is naturally "communicated by the word 'bridge,' and by the expressions "'bridge over' and 'arranged across the crotch' is not that "of a stay which is not a bridge, but is that of a stay which "spans an open space. The employment of these terms by "the patentee is not conclusive as to his meaning, but he "used words unnaturally, if he intended to convey the idea "that his check piece went around and not across the apex "of the fly opening. But, turning to the sentence which is "the centre of the discussion, it seems to me that the words, "'the lower end of the buttonhole strip does not extend "'down and fasten into the crotch, *d*, as in the common con- "'struction of pantaloons, but bridges over the crotch,' can- "not fairly be interpreted to mean that the strip does not "simply extend down, and fasten into the crotch, and stop "there, as in the common construction, but bridges over, "because the patentee described in the concluding part of the "sentence and of the paragraph what he meant by the words "'bridge over,' by saying, 'being securely stitched at *c* to the "'button strip *a*. The buttonhole strip is also firmly secured "'at *f*, below the lower buttonhole.' The inventor here de- "clares that the buttonhole strip is a bridge, inasmuch as it "is securely stitched to the button strip at *e*, and is firmly "secured on its own side at *f*. The old construction by "which it went down to the crotch is abandoned, and it now "crosses over the crotch at *f* and *e*.

He compares this with the defendants' construction, which

he thus correctly describes: "The overalls which the defend-"ants make do not have a bridge spanning an open space "between the bridge and the point where the two sides of "the fly meet, but the buttonhole strip extends down to and "is fastened at the crotch of the fly, and *extends upwards and* "*is secured to the button strip at the opposite side of said fly* "*portion*," being lapped *behind* the button strip. The overalls which the plaintiff now makes are of the same construction, except that the buttonhole strip is lapped upon the *front* side of the button strip. This difference is not material.

Now we say —

First, that the *operation* of the bridge piece *is exactly the same*, whether the extended buttonhole strip is fastened down to and at the crotch so that you can't see any open space under, or passes across it without touching it so that you can see an open space under it, so long as it keeps on beyond the crotch and extends upwards and is secured to the opposite side of the fly portion.

What is that operation? The original patent says, upon this subject, that the improvement adds to the durability of the garment "by preventing the stretch of the cloth or stitching "at the crotch," and the original claim says that the bridge piece is "arranged across the crotch, substantially as de-"scribed, whereby the *strain* at the crotch, when the fly is "opened and spread apart, is *received by said bridge or check-*"*piece instead of at the angle of the crotch itself*." The reissue says the same thing in different words. It says that the use of the check piece is "to bridge over and protect "from the tensional strain the crotch of said fly:" that it adds to the durability of the garment "by preventing any "stretch of the cloth or rupture of the stitching at the crotch "of the fly;" "that any extreme or sudden distension of the "fly that would otherwise tend to strain and rupture it at

"the point *d* will come wholly upon the check piece which "extends across said point; and that thus the crotch *d* is "perfectly protected against injury from the effects of any "such strain:" and (in the claims) "to receive any strain "occasioned by the spreading apart of the fly and which "would otherwise be exerted upon the crotch of the fly," and that the check piece is "adapted to prevent any tension "at the crotch *d* that might operate injuriously upon it." All these expressions mean one and the same perfectly simple thing, *i.e.*, that the check piece extending across the crotch takes the strain which would otherwise be taken by the crotch seam and tend to rupture.

This will be so whether the check piece is a little shorter than the sum of the two sides of the fly-front so that you can see under it, or just the same length so that you cannot see under it; and it will be equally so if the check piece, being of just the same length, is tacked or stitched down to the crotch, so long as it keeps on past the crotch and extends upwards and is there fastened, on the farther side of the crotch, to the button strip.

Now this last is what the defendant does.

Mr. Renwick says, (Record, page 30), "It is wholly im- "material, for the purpose of resisting the strain by the check "piece when the fly portion of each exhibit is distended, "whether the check piece be a little above the crotch, as in "'Exhibit Claims 2 A,' so that you can see under it, or the "check piece be close to the crotch, so that light is perceptible "under it, or that check piece be not only close to the crotch "but stitched to the opposite side of the fly portion, so that "one cannot see under the check piece. In each of the three "exhibits, the strain is not resisted by the crotch, because the "check piece is present in the exhibit to sustain the strain."

Upon the whole case, we submit —

(1) That the invention claimed in the second claim of the reissue is *patentable.*

(2) That the defendants have failed to show beyond reasonable doubt that it is not *new.*

(3) That it is described in the original and covered by the generic claim of the original.

(4) That it is substantially embodied in the overalls made and sold by the defendants.

And therefore that the decree of the court below should be reversed.

CAUSTEN BROWNE.

APPENDIX.

Opinion of Judge Shipman on Rehearing.

Shipman, J.: This is a bill in equity to restrain the defendants from the alleged infringement of the second claim of reissued Letters Patent No. 9616, applied for February 19, 1881, and issued March 22, 1881, to Rodmond Gibbons for an improvement in pantaloons. The original patent was dated June 6, 1876.

A brief opinion, in which the bill was directed to be dismissed, was filed on May 14, 1887. Upon the application of the plaintiff, the case was thereafter re-argued.

The case depends upon the proper construction of the second claim of the reissued patent, and the construction turns upon the question whether this claim, if construed according to its literal meaning, is an enlargement of the single claim of the original Letters Patent. The plaintiff contends that the defendants infringe the patented invention as it was originally described and claimed, and that there was no enlargement in the reissue, but a more accurate statement of the invention which was claimed in the original patent. I therefore quote the substance of the original specification, so that the scope of the invention as it was therein explained may be seen:

"My invention relates to a fastening for the crotch in the "fly of pantaloons, or similar garments, and it consists in "bridging said crotch with a check piece of cloth or other "inelastic, pliable material, as hereinafter fully described. "The object of this invention is to prevent that tension at "the crotch ordinarily produced either by continued use of "the garment, or by any undue strain caused by the assump-"tion by the wearer of any posture of the body, or by the "removal of the garment calculated to produce such an effect.

"The said improvement is applicable to all descriptions of "pantaloons and garments of a similar character, its applica- "tion to the garment adding greatly to its durability by pre- "venting the stretch of the cloth or stitching at the crotch.

"To enable persons skilled in the art of manufacturing the "garments to which my invention is adaptable, I describe "the same as follows, referring to the annexed drawing: Fig. "1 is a view of the upper part of a pair of pantaloons, the "front of the fly being turned down so as to show the appli- "cation of the improvement. Figs. 2 and 3 are, respectively, "edge and face views, on an enlarged scale, of the fly ex- "tended so as to show the attachment of the improvement. "Fig. 4 shows a modification in construction. In Figs. 1, "2, 3, the button strip of the fly is represented by *a*, and "the button *b*. The buttonhole strip is indicated by *c*, and "between the buttonholes it is stitched to the front of the "garment in the ordinary way. The lower end of the but- "tonhole strip does not extend down and fasten into the "crotch *d*, as in the common construction of pantaloons, but "bridges over the crotch, being securely stitched at *e* to the "button strip *a*. The buttonhole strip is also firmly secured "at *f*, below the lower buttonhole. Fig. 4 shows, instead of "the preferred construction exhibited in the other figures, a "separate piece of cloth serving as the bridge or check piece. "This construction I deem to be within the scope of my in- "vention.

"My invention, as seen in the manner preferred by me, "adds nothing to the cost of the garment, but rather cheap- "ens its manufacture by causing the attachment of the lower "end of the buttonhole strip to be made at a point more "easily reached than that at which the connection is ordina- "rily made."

The letter *d* is the crotch of the fly, and is at the crotch

seam of the fly, and that seam is at the upper end of the seam which runs from the crotch between the legs upwards to the crotch of the fly. The letter *e* is at a point on the button strip opposite to *f* upon the buttonhole strip. The points *e* and *f*, as represented in the drawings, are so far removed from the crotch *d* that there is a considerable open space under the line or strip which unites *e* and *f*. Each of the drawings, except No. 3, which is a plan view, shows an open space under the check piece, and represents the check piece as one side of a triangle of which the other two sides are the right and left fly-fronts converging to an apex at *d*.

The claim of the original patent was as follows: —

"In combination with the fly of pantaloons or similar gar-"ments, an inelastic bridge or check piece, arranged across "the crotch thereof substantially as described, whereby the "strain at the crotch when the fly is opened and spread "apart is received by said bridge or check piece instead of "at the angle of the crotch itself."

The claims of the reissued patent are as follows: —

"1. The combination with the fly of a pair of pantaloons, "or other similar garments, of an inelastic bridge or check "piece arranged across the crotch of the fly and operating "substantially as described, to receive any strain occasioned "by the spreading apart of the fly, and which would other-"wise be exerted upon the crotch of the fly.

"2. In combination with the fly portion of a pair of pan-"taloons, or other similar garment, a check piece made inte-"gral with the buttonhole strip of the fly, and adapted to "prevent any tension at the crotch, *d*, that might operate "injuriously upon it."

The overalls which the defendants make do not have a bridge spanning an open space between the bridge and the point where the two sides of the fly meet, but the buttonhole

strip extends down to and is fastened at the crotch of the fly, and extends upwards and is secured to the button strip at the opposite side of said fly portion, being lapped behind the button strip. The overalls which the plaintiffs now make are of the same construction, except that the buttonhole strip is lapped upon the front side of the button strip. This difference is not material.

The patentee's licensees instructed their employees in 1877 to bring the sewing of the crotch seam as close as possible up to the check piece. The reissue was applied for after the defendants began to make and sell the garments which are said to infringe.

The question which first presents itself is whether under a proper construction of the second claim of the reissued patent it should not be confined to a bridge or check piece which is arranged across the fly-front and bridge over the crotch of the fly, as shown in drawings 1, 2, and 4.

The plaintiff insists that the actual invention of the patentee was a check piece which received the force of any unusual strain upon the fly-front of overalls; that it is immaterial whether the strip is arranged as a bridge with an open space underneath, or as a continuation of the buttonhole strip beyond the apex of the fly opening up to the button strip; that the open space has no operation, and that the original specification is, at least, consistent with the invention as it is now used, and does not demand a limited and narrow construction which would deprive the owners of the reissued patent of the benefit which would otherwise result therefrom. It is true that the idea of a strip of cloth which shall serve as a strengthening piece or a protection against a strain at the angle of the fly-front is better developed by making the stay when integral with the buttonhole strip a continuation of it around instead of across the apex of the fly opening, and

that a stay with an open space underneath it has apparently no advantage over the other method except in economy of manufacture; and it is also true that it is the duty of a court to give Letters Patent for inventions a construction which shall sustain the first [just] claims of the inventor and shall relieve him from the injurious effect of an imperfect description of the invention which he had attempted to secure. If, however, the patentee has plainly pointed out and by his description has established the boundaries of his invention, they cannot be enlarged by construction. Recognizing this principle, and that the question is not what the patentee might have applied for, but what he did apply for and receive, the plaintiff says that the original patent, fairly construed, is not limited to a stay or check piece which is a bridge having an open space under it.

The specification shows two methods of construction; one shown in Figure 4, which is a separate piece of cloth, and which is a bridge, while the buttonhole strip is continued, as previously, to the crotch of the fly; the other shown in the other figures, in which the buttonhole strip becomes the bridge. The mooted point is whether this strip is described as not extending down and fastening into the crotch, but, on the contrary, bridging over it, or whether it is described as not extending to the crotch and stopping there, as in the common construction, but extending beyond the angle and lapping into [onto] the button strip. The plaintiff insists that when the patentee said in his specification that the lower end of the buttonhole strip does not extend down to and fasten into the crotch, *d*, as in the common construction of pantaloons, he meant that the strip does not extend down into the crotch *d*, and become incorporated with the fly-crotch seam, and stop there, as in the common construction, but bridges over the crotch. It says, also, that in the common construction

of fly-fronts, the lower end of the buttonhole strip passed down into, and stopped in, the seam of the fly-crotch, whereas in the patented improvement the lower end of the strip is not thus carried down into, and incorporated with, the fly-crotch seam, but is carried up on the other side and is attached to the button strip.

The natural construction of the specification is that, when the patentee described a bridge which was arranged across the crotch of a fly, he meant a brace or stay which crossed, and did not go around, the apex of the fly-front. A different construction would not occur to the reader, until he learned the fact that such a construction had been suggested, or that it might be desirable. The idea which is naturally communicated by the word "bridge," and by the expressions "bridge over" and "arranged across the crotch" is not that of a stay which is not a bridge, but is that of a stay which spans an open space. The employment of these terms by the patentee is not conclusive as to his meaning, but he used words unnaturally, if he intended to convey the idea that his check piece went around and not across the apex of the fly opening. But, turning to the sentence which is the centre of the discussion, it seems to me that the words, "the lower end of the "buttonhole strip does not extend down and fasten into the "crotch, *d*, as in the common construction of pantaloons, but "bridges over the crotch," cannot fairly be interpreted to mean that the strip does not simply extend down, and fasten into the crotch, and stop there as in the common construction, but bridges over, because the patentee described in the concluding part of the sentence and of the paragraph what he meant by the words "bridge over," by saying, "being securely "stitched at *c* to the button strip *a*. The buttonhole strip "is also firmly secured at *f*, below the lower buttonhole." The inventor here declares that the buttonhole strip is a

bridge, inasmuch as it is securely stitched to the button strip at *e*, and is firmly secured on its own side at *f*. The old construction by which it went down to the crotch is abandoned, and it now crosses over the crotch at *f* and *e*.

Again, the drawings, which are a picture of the invention, show clearly what the patentee was trying to describe in words. They show a bridge, and nothing but a bridge, and leave no doubt in my mind that the only invention for which the patentee applied for a patent was that of a check piece, which at the points *e* and *f*, below the lower buttonhole, crossed over and connected the right and left fronts of the fly. Any other construction of the patent would not only disregard but would contradict the drawings.

The invention of the original patent, as well as of the first claim of the reissue, was a piece of inelastic, flexible material arranged across the crotch, as a bridge, with its two ends secured to opposite sides of the fly-front, at points so far down the two sides that, when a strain is brought thereon, the bridge will take the entire strain. The second claim of the reissue was designed to include a check piece which is not only integral with the buttonhole strip, but which extends down to, and is fastened at, the crotch of the fly, and extends up upon the other side of the fly, and is fastened to the button strip. This claim is invalid, unless it is limited to the bridge or check piece of the original claim. With that construction there is no infringement, and the bill is dismissed.

Office Supreme Court U. S.
FILED,
MAR 20 1891
JAMES H. McKENNEY,
CLERK.

U. S. Supreme Court.

363

PATENT CLOTHING COMPANY (LIMITED)

against

H. B. GLOVER, J. B. GLOVER, L. C. BISSELL AND A. J. PARKER.

APPELLEE'S BRIEF.

GILBERT M. PLYMPTON,
For Appellee.

U. S. Supreme Court.

PATENT CLOTHING COMPANY (Limited)

vs.

H. B. GLOVER, J. B. GLOVER, L. C. BISSELL and A. J. PARKER.

In Equity.

Defendants' Brief.

STATEMENT.

The complainant, by consent, amended the bill "by charging the defendants with the infringement of the Gibbons reissue only" (see stipulation of May 18, 1886, p. 11, fol. 21, Record), so that, as the bill stands before the Court, the defendants are charged with infringing but one patent, viz.:

REISSUE NO. **9,616,** dated March 22, 1881, and issued to Rodmond Gibbons that day.

This reissue is for "PANTALOONS."

The ORIGINAL patent which was surrendered in order to obtain this Gibbons reissue was dated JUNE **6, 1876**, and NUMBERED **178,287,** and was applied for on the 25th of May, 1876. The bill was filed January 18, 1884, and although the proofs are not voluminous on either side, three years elapsed before the defendants could get to trial, the complainants refusing to put the case on the calendar, and repeatedly opposing defendants' efforts to get a hearing.

On the 13th and 14th days of April, 1887, the case was argued before his Honor Judge Nathaniel Shipman by Mr. Causten Brown and Mr. Wm. A. Jenner for the complainant, and by Mr. Gilbert M. Plympton for the defendants, and on the 14th day of May, 1887, his Honor rendered and filed the following

Opinion.

SHIPMAN, *J:* "This is a bill in equity to restrain the defendants from the alleged infringement of the second claim of reissued letters patent No. 9,616, applied for February 19, 1881, and issued March 22, 1881, to Rodmond Gibbons, for an improvement in pantaloons. The original patent was dated June 6, 1876.

The specification of the original patent says that the invention "relates to a fastening for the crotch in the fly of pantaloons and similar garments; and it consists in bridging said crotch with a check piece of cloth or other inelastic pliable material, as hereinafter fully described." The patentee further says: "The lower end of the button-hole strip does not extend down and fasten into the crotch d, as in the common construction of pantaloons, but bridges over the crotch." * * * Fig. 4 shows, instead of the preferred construction exhibited in the other figures, a separate piece of cloth serving as the bridge or check piece."

The single claim of the original patent was as follows:

"In combination with the fly of pantaloons or similar garments, an inelastic bridge or check piece, arranged across the crotch thereof, substantially as described, whereby the strain at the crotch, when the fly is opened and spread apart, is received by said bridge or check piece instead of at the angle of the crotch itself."

The claims of the reissued patents are as follows:

"1. The combination with the fly of a pair of pantaloons or other similar garment, of an inelastic

bridge or check piece arranged across the crotch of the fly, and operating, substantially as described, to receive any strain occasioned by the spreading apart of the fly and which would otherwise be exerted upon the crotch of the fly.

2. The combination with the fly portion of a pair of pantaloons or other similar garment, a check piece made integral with the button-hole strip of the fly and adapted to prevent any tension at the crotch d that might operate injuriously upon it."

The overalls which the defendants make do not have a bridge spanning an open space between the bridge and the point where the two sides of the fly meet, but the buttonhole strip extends down to and is fastened at the crotch and extends upwards and is secured at the button strip at the opposite side of the said fly portion, being lapped behind the button strip. The overalls which the plaintiff now makes are of the same construction, except that the buttonhole strip is lapped upon the front side of the button strip. This difference is not material.

The question which first presents itself is whether under a proper construction of the reissued patent it should not be confined to a bridge or check piece, which is arranged across the fly front and bridges over and is not fastened at the crotch. The reissue was applied for four years and eight months after the original patent was granted and several months after the defendants began to make and sell the garments which are said to infringe, but it is earnestly contended that the reissue is not an enlargement of the original patent, but is a more careful statement of the invention which was therein described and claimed.

I am clearly of the opinion that the invention of the original patent, as described and claimed therein, was a piece of inelastic, flexible material arranged across the crotch as a bridge, with its two ends secured on opposite sides of the fly front at points so far down the two sides that when a strain is brought thereon the bridge will take the entire

strain. The original specification, drawings, and claim show that the bridge was the invention for which the patent was applied for, and that any other invention is beyond its terms. It is also the invention of the first claim of the reissue.

The second claim of the reissue was designed to include a check piece which is not only integral with the buttonhole strip, but which extends down to and is fastened at and crosses the crotch of the fly and thence extends up upon the other side of the fly and is fastened to the button strip. This is not the invention of the original patent, which expressly said that the buttonhole strip when serving also as a bridge does not extend down and fasten into the crotch.

The second claim of the reissue is invalid unless it is limited to the bridge or check piece of the original claim. With that construction there is no infringement and the bill is dismissed. (P. 174 Record and 31 Fed. Rep., 816.)

After this opinion had been given and on the ground that a reply brief had not been filed (one of the four or five briefs submitted by complainants' counsel) the Court on an *ex parte* application granted complainants a rehearing of the cause, which was duly argued by counsel, and on the 30th of July, 1887, his honor, Judge Shipman, filed this second

Opinion.

JULY 30, 1887.

"On Rehearing:

CAUSTEN BROWN and WM. A. JENNER for plaintiff.

GILBERT M. PLYMPTON for defendants.

SHIPMAN, *J.* This is a bill in equity to restrain the defendants from the alleged infringements of the second claim of the reissued Letters Patent No. 9,616, applied for February 19, 1881, and issued March 22, 1881, to Rodmond Gibbons, for an improvement in pantaloons. The original patent was dated June 6, 1876.

A brief opinion, in which the bill was directed to be dismissed, was filed on May 14, 1887. Upon the application of the plaintiff, the case was thereafter reargued.

The case depends upon the proper construction of the second claim of the reissued patent, and the construction turns upon the question whether this claim, if construed according to its literal meaning, is an enlargement of the single claim of the original letters patent. The plaintiff contends that the defendants infringe the patented invention, as it was originally described and claimed, and that there was no enlargement in the reissue, but a more accurate statement of the invention which was claimed in the original patent. I therefore quote the substance of the original specification, so that the scope of the invention, as it was therein explained, may be seen.

"My invention relates to a fastening for the crotch in the fly of pantaloons, or similar garments, and it consists in bridging said crotch with a check piece of cloth or other inelastic, pliable material, as hereinafter fully described. The object of this invention is to prevent that tension at the crotch ordinarily produced either by continued use of the garment, or by any undue strain caused by the assumption by the wearer of any posture of the body, or by the removal of the garment, calculated to produce such an effect. The said improvement is applicable to all descriptions of pantaloons and garments of a similar character; its application to the garment adding greatly to its durability, by preventing the stretch of the cloth or stitching at the crotch.

"To enable persons skilled in the art of manufacturing the garments to which my invention is adaptable, I describe the same as follows, referring to the annexed drawing: Fig. 1 is a view of the upper part of a pair of pantaloons, the front of the fly being turned down, so as to show the application of the improvement. Figs. 2 and 3 are, respectively, edge and face views, on an enlarged scale, of the fly, extended so as to show the attachment of the improvement. Fig. 4 shows a modification in construction. In Figs. 1, 2, 3, the button strip of the fly is represented by *a*, and the buttons, *b*. The buttonhole strip is indicated by *c*, and between the buttonholes it is stitched to the front of the garment in the ordinary way. The lower end of the buttonhole strip does not extend down, and fastened into the crotch, *d*, as in the common construction of pantaloons, but bridges over the crotch, being securely stitched at *e* to the bottom strip, *a*. The buttonhole strip is also firmly secured at *f* below the lower button-hole. Fig. 4 shows, instead of the preferred construction exhibited in the other figures, a separate piece of cloth serving as a bridge or check piece. This construction I deem to be within the scope of my invention.

"My invention, as seen in the manner preferred by me, adds nothing to the cost of the garment, but rather cheapens its manufacture, by causing the attachment of the lower end of the button-hole strip to be made at a point more easily reached than that at which the connection is ordinarily made."

The letter *d* is the crotch of the fly, and is at the crotch seam of the fly, and that seam is at the upper end of the seam which runs from the crotch between the legs upward to the crotch of the fly. The letter *e* is at a point on the button strip opposite to *f* upon the buttonhole strip. The points *e* and *f*, as represented in the drawings, are so far removed from the crotch, *d*, that there is a considerable open space under the line or strip which unites *e* and *f*.

Each of the drawings, except No. 3, which is a plan view, shows an open space under the check piece, and represents the check piece as one side of a triangle, of which the other two sides are the right and left fly fronts converging to the apex at *d*.

The claim of the original patent was as follows:

"In combination with the fly of pantaloons, or similar garments, an inelastic bridge or check piece, arranged across the crotch thereof, substantially as described, whereby the strain at the crotch, when the fly is opened and spread apart, is received by said bridge or check piece, instead of at the angle of the crotch itself."

The claims of the reissued patent are as follows:

"1. The combination, with the fly of a pair of pantaloons, or other similar garments, of an inelastic bridge or check piece arranged across the crotch of the fly, and operating substantially as described, to receive any strain occasioned by the spreading apart of the fly, and which would otherwise be exerted upon the crotch of the fly.

"2. In combination with the fly portion of a pair of pantaloons, or other similar garment, a check piece made integral with the buttonhole strip of the fly, and adapted to prevent any tension at the crotch, *d*, that might operate injuriously upon it."

The overalls which the defendants made do not have a bridge spanning an open space between the bridge and the point where the two sides of the fly meet, but the buttonhole strip extends down to, and fastened at, the crotch of the fly, and extends upwards and is secured to the button strip at the opposite side of the said fly portion, being lapped behind the button strip. The overalls which the plaintiff now makes are of the same construction, except that the buttonhole strip is lapped upon the front side of the button strip. This difference is not material.

The patentee's licensees instructed their employees, in 1877 to bring the sewing of the crotch seam as close as possible up to the check piece. The reissue was applied for after the defendants began to make and sell the garments which are said to infringe.

The question which first presents itself is whether, under the proper construction of the second claim of the reissued patent, it should not be confined to a bridge or check piece which is arranged across the fly front and bridge over the crotch of the fly, as shown in drawings 1, 2, and 4.

The plaintiff insists that the actual invention of the patentee was a check piece which received the force of an unusual strain upon the fly front of the overalls; that it is immaterial whether the strip is arranged as a bridge, with an open space underneath, or as a continuation of the buttonhole strip, beyond the apex of the fly opening, up to the button strip; that the open space has no operation, and that the original specification is, at least, consistent with the invention, as it is now used, and does not demand a limited and narrow construction, which would deprive the owners of the reissued patent of the benefit which would otherwise result therefrom. It is true that the idea of a strip of cloth, which shall serve as a strengthening piece or a protection against a strain at the angle of the fly front, is better developed by making the stay, when integral with the buttonhole strip, a continuation of it around, instead of across, the apex of the fly opening, and that a stay with an open space underneath it has apparently no advantage over the other method, except in economy of manufacture; and it is also true that it is the duty of a court to give letters patent for invention a construction which shall sustain the first claims of the inventor, and shall relieve him from the injurious effect of an imperfect description of the invention which he had attempted to secure. If, however, the patentee has plainly pointed out, and by his description has established, the boundaries of the invention, they cannot be enlarged by construction. Recognizing this principle, and that the question is not what the patentee might have applied for, but what did he apply for and receive, the plaintiff says that the original patent, fairly construed, is not limited to a stay or check piece which is a bridge having an open space under it.

The specification shows two methods of construction; one, shown in Fig. 4, which is a separate piece of cloth, and which is a bridge, while the buttonhole strip is continued, as previously, to the crotch of the fly; the other, shown in the other figures, in which the buttonhole strip becomes the bridge. The mooted point is whether this strip is described as not extending down and fastening into the crotch, but, on the contrary, bridging over it, or whether it is described as not extending into the crotch and stopping there, as in the common construction, but extending beyond the angle and lapping into the button strip. The plaintiff insists that when the patentee said in his specification that the lower end of the buttonhole strip does not extend down to, and fasten into the crotch, *d*, as in the common construction of pantaloons, he meant that the strip does not extend down into the crotch, *d*, and become incorporated with the fly-crotch seam, and stop there as in the common construction, but bridges over the crotch. It says, also, that, in the common construction of fly-fronts, the lower end of the buttonhole strip passes down into, and stopped in the seam of the fly-crotch, whereas, in the patented improvement, the lower end of the strip is not thus

carried down into, and incorporated with, the fly-crotch seam, but is carried up on the other side and is attached to the button strip.

The natural construction of the specification is that, when the patentee described a bridge which was arranged across the crotch of a fly, he meant a brace or stay which crossed, and did not go around, the apex of the fly-front. A different construction would not occur to the reader, until he learned the fact that such a construction had been suggested or that it might be desirable. The idea which is naturally communicated by the word "bridge," and by expressions "bridge over" and "arranged across the crotch," is not that of a stay which is not a bridge, but is that of a stay which spans an open space. The employment of these terms by the patentee is not conclusive as to his meaning, but he uses words unnaturally if he intended to convey the idea that his checkpiece went around and not across the apex of the fly opening. But, turning to the sentence which is the center of the discussion, it seems to me that the words, "the lower end of the buttonhole strip does not extend down and fasten into the crotch, *d*, as in the common construction of pantaloons, but bridges over the crotch," cannot be fairly interpreted to mean that the strip does not simply extend down, and fasten into the crotch, and stop then, as in the common construction, but bridges over, because the patentee described in the concluding part of the sentence and of the paragraph what he meant by the words "bridge over," by saying: "Being securely stitched at *e* to the button strip, *a*. The buttonhole strip is also firmly secured at *f*, below the lower buttonhole." The inventor here declares that the buttonhole strip is a bridge, inasmuch as it is securely stitched to the button-strip at *e*, and is firmly secured on its own side at *f*. The old construction by which it went down to the crotch is abandoned, and it now crosses over the crotch at *f* and *e*.

Again, the drawings, which are a picture of the invention, show clearly what the patentee was trying to describe in words. They show a bridge, and nothing but a bridge, and leave no doubt in my mind that the only invention for which the patentee applied for a patent was that of a check-piece, which at the points *e* and *f*, below the lower buttonhole, crossed over and connected the right and left fronts of the fly. Any other construction of the patent would not only disregard but would contradict the drawings.

The invention of the original patent, as well as of the first claim of the reissue, was a piece of inelastic, flexible material arranged across the crotch, as a bridge, with its two ends secured to opposite sides of the fly front, at points so far down the two sides that, when a strain is brought thereon, the bridge will take the entire strain. The second claim of the reissue was designed to include a check piece which is not only integral with the buttonhole strip, but which extends down to,

and is fastened at, the crotch of the fly, and extends up upon the other side of the fly, and is fastened to the button-strip. This claim is invalid, unless it is limited to the bridge or check piece of the original claim. With that construction, there is no infringement, and the bill is dismissed."

This opinion for some reason is not in the record on appeal, but it is reported in 31 Fed. Rep., 818.

And on August 4th, 1887, the following decree was filed:

Decree.

"This cause having come on for final hearing upon the pleadings and proofs and having been argued by Mr. Causten Browne and Mr. William A. Jenner, for the complainant, and Mr. Gilbert M. Plympton for defendants, and the same having been duly considered and decided and an opinion filed on the 14th day of May, 1887, directing the bill of complaint to be dismissed, and thereafter a rehearing of said cause, upon motion of the complainant, having been ordered, and said cause having been reargued by counsel for the respective parties:

Now, upon due consideration of the same, the Court being of opinion that the second claim of reissued patent No. 9616, granted to Rodmond Gibbons on the 22 day of March, 1881, is invalid unless it is limited to the bridge or check piece of the original claims, and with that construction there is no infringement:

It is ordered, adjudged, and decreed that the bill of complaint in said cause be, the same hereby is, dismissed with costs to the defendants, to be taxed by the clerk of this court, the defendants to have execution therefor. N. SHIPMAN, Judge."

[P. 176 Trans. of Record.]

carried down into, and incorporated with, the fly-crotch seam, but is carried up on the other side and is attached to the button strip.

The natural construction of the specification is that, when the patentee described a bridge which was arranged across the crotch of a fly, he meant a brace or stay which crossed, and did not go around, the apex of the fly-front. A different construction would not occur to the reader, until he learned the fact that such a construction had been suggested or that it might be desirable. The idea which is naturally communicated by the word "bridge," and by expressions "bridge over" and "arranged across the crotch," is not that of a stay which is not a bridge, but is that of a stay which spans an open space. The employment of these terms by the patentee is not conclusive as to his meaning, but he uses words unnaturally if he intended to convey the idea that his checkpiece went around and not across the apex of the fly opening. But, turning to the sentence which is the center of the discussion, it seems to me that the words, "the lower end of the buttonhole strip does not extend down and fasten into the crotch, *d*, as in the common construction of pantaloons, but bridges over the crotch," cannot be fairly interpreted to mean that the strip does not simply extend down, and fasten into the crotch, and stop then, as in the common construction, but bridges over, because the patentee described in the concluding part of the sentence and of the paragraph what he meant by the words "bridge over," by saying: "Being securely stitched at *c* to the button strip, *a*. The buttonhole strip is also firmly secured at *f*, below the lower buttonhole." The inventor here declares that the buttonhole strip is a bridge, inasmuch as it is securely stitched to the button-strip at *c*, and is firmly secured on its own side at *f*. The old construction by which it went down to the crotch is abandoned, and it now crosses over the crotch at *f* and *e*.

Again, the drawings, which are a picture of the invention, show clearly what the patentee was trying to describe in words. They show a bridge, and nothing but a bridge, and leave no doubt in my mind that the only invention for which the patentee applied for a patent was that of a check-piece, which at the points *e* and *f*, below the lower buttonhole, crossed over and connected the right and left fronts of the fly. Any other construction of the patent would not only disregard but would contradict the drawings.

The invention of the original patent, as well as of the first claim of the reissue, was a piece of inelastic, flexible material arranged across the crotch, as a bridge, with its two ends secured to opposite sides of the fly front, at points so far down the two sides that, when a strain is brought thereon, the bridge will take the entire strain. The second claim of the reissue was designed to include a check piece which is not only integral with the buttonhole strip, but which extends down to,

and is fastened at, the crotch of the fly, and extends up upon the other side of the fly, and is fastened to the button-strip. This claim is invalid, unless it is limited to the bridge or check piece of the original claim. With that construction, there is no infringement, and the bill is dismissed."

This opinion for some reason is not in the record on appeal, but it is reported in 31 Fed. Rep., 818.

And on August 4th, 1887, the following decree was filed:

Decree.

"This cause having come on for final hearing upon the pleadings and proofs and having been argued by Mr. Causten Browne and Mr. William A. Jenner, for the complainant, and Mr. Gilbert M. Plympton for defendants, and the same having been duly considered and decided and an opinion filed on the 14th day of May, 1887, directing the bill of complaint to be dismissed, and thereafter a rehearing of said cause, upon motion of the complainant, having been ordered, and said cause having been reargued by counsel for the respective parties:

Now, upon due consideration of the same, the Court being of opinion that the second claim of reissued patent No. 9616, granted to Rodmond Gibbons on the 22 day of March, 1881, is invalid unless it is limited to the bridge or check piece of the original claims, and with that construction there is no infringement:

It is ordered, adjudged, and decreed that the bill of complaint in said cause be, the same hereby is, dismissed with costs to the defendants, to be taxed by the clerk of this court, the defendants to have execution therefor. N. SHIPMAN, Judge."

[P. 176 Trans. of Record.]

I.

THE REISSUE ON WHICH THIS SUIT IS BROUGHT IS VOID BECAUSE OF LACHES, NEARLY FIVE YEARS HAVING ELAPSED BETWEEN THE ISSUING OF THE ORIGINAL PATENT AND THE APPLICATION FOR THE REISSUE OF THE SAME.

The Gibbons original patent is dated June 6, 1876. The reissue was applied for February 19, 1881, or more than four years and seven months after the issuing of the original patent, and

> "If a patentee has not claimed as much as he is entitled to "claim, he is bound to discover the defect in reasonable time "or he loses all right to a reissue; and if the Commissioner of "Patents, after the lapse of such reasonable time, undertakes "to grant a reissue for the purpose of correcting the supposed "mistake, he exceeds his power, and acts under a mistaken "view of the law; and the Court, seeing this, has a right, and "it is its duty to declare the reissue *pro tanto* void in any suit "founded upon it." * * * * *
>
> "The specification is very plain and free from complexity, "the claims in the original patent were clear and explicit. "There was no ambiguity, and nothing to prevent the "patentee from seeing at once, on inspecting his patent, "whether the whole invention was claimed or not. We can "see no possible excuse, and none has been attempted to be "shown, for allowing the patent to stand the length of time "it did (less than four years) without any attempt to have it "amended. The reissue was made against law apparent on "its face, and nothing is shown in the record to remove this "illegality. The case is clearly within the principle laid "down in *Miller* vs. *The Brass Company*, and the patent must "be regarded as void."

Mahn *vs.* Harwood, 112 U. S., 354.
Also Wollensak *vs.* Reiher, 115 U. S., 96.
And numerous other cases on the same point decided by the Supreme Court since Miller *vs.* The Brass Co.

The case before the Court is even stronger than that of Mahn *vs.* Harwood, for Gibbons' *laches* extended over a period of nearly five years, or about a year longer than in the case of Mahn *vs.* Harwood, as in

Ives *vs.* Sargent, 119 U. S., 652.

"A delay of two years by analogy to the law of public use "before an application for a patent, should be construed "equally favorable to the public, and that excuse for any "longer delay than that should be made manifest by the "special circumstances of the case."

II.

NO EXCUSE HAS BEEN ATTEMPTED TO BE SHOWN FOR ALLOWING GIBBONS' ORIGINAL PATENT TO STAND THE LENGTH OF TIME IT DID BEFORE SURRENDERING IT FOR A REISSUE. HE ALLOWED AN INTERVAL OF FIVE YEARS TO ELAPSE BEFORE REISSUING AND OFFERS NO EXCUSE.

"If it appears in cases where the claim is merely expanded "(as it is in the case before the Court) that the delay has been "for *two* years, or more, it is adjudged to invalidate the reissue, "unless the delay is accounted for and excused by special "circumstances, which show it to have been not unreason-"able."

Wollensack *vs.* Reiher, above cited.

And in Mahn *vs.* Harwood, also above cited, this language is employed:

"We can see no possible excuse, *and none has been attempted* "*to be shown* for allowing the patent to stand the length of "time it did without an attempt to have it amended. The "reissue was made against law apparent on its face, and "nothing is shown in the record to remove this illegality, and "the reissue must be regarded as void."

And it is not only incumbent upon the plaintiff to give reasons for his delay in asking for a reissue so as to excuse his *laches*, but as in *Ives* vs. *Sargent* and *Wollensack* vs. *Reiher* the reasons must be applicable to the peculiar circumstances of the case. No general excuse will be deemed sufficient to pardon the neglect.

III.

GIBBONS WAITED UNTIL THE DEFENDANTS PRODUCED, PATENTED, MADE AND SOLD IN OPEN MARKET, THE ALLEGED INFRINGING OVERALLS, AND THEN REISSUED AND BROADENED HIS PATENT.

The alleged infringing overalls of the defendants are made under a patent granted to one of the defendants, J. B. Glover, the 3d of February, 1880 (p. 172, Record). This patent (Defts' Ex. "S," Mch. 30, 1886.) was applied for in July, 1879, and before the date of this application the defendants made and sold the alleged infringing overalls.

This making and selling, and patenting by the defendant Glover, was more than one year before Gibbons applied for his reissue on which this suit is based. See testimony, Henry B. Glover, pp. 100, 101, Record.

As in Coon *vs.* Wilson, 113 U. S., 268.

> "The defendant's collars were first made and sold after the "original patent of Wilson was granted. * * * It is evi- "dent that the reissue was obtained because the defendant's "collar, with a continuous band, had been put on the market, "and for the purpose of obtaining claims which would cer- "tainly cover such a collar. The changes made in the speci- "fication and claims show this."

See also:

Miller *vs.* Brass Co., 104 U. S., 354.
James *vs.* Campbell, 104 U. S., 350.
Burr *vs.* Duryea, 1 Wal., 531.
Matthews *vs.* Ironclad Mfg. Co., 124 U. S., 347.

The defendants are alleged to infringe only the new or reissued second claim of the Gibbons reissue 9616. In that respect and under like circumstances, the case is the same as Matthews *vs.* The Ironclad Co., in which the Court said:

> "The new claims are sought to be used to cover structures "which came into existence after the original patent was "granted, but before application was made for the reissue.

" * * * During that interval the defendant engaged in "making the structures alleged to infringe. It is apparent "that the plaintiff knew this and took his reissue in order to "be sure and have claims which would cover the defendant's "structures. They did not infringe the claim of the original "patent."

IV.

THE REISSUE IN SUIT IS BROADER THAN WAS THE ORIGINAL PATENT, AND IS THEREFORE VOID.

A mere comparison of the two instruments shows this fact, and for the purpose of facilitating the comparison the original and reissued patents are printed below in parallel columns; the new matter in the reissue being in italics, and the words *omitted* from original in capitals.

ORIGINAL (page 160).

Specification forming part of Letters Patent No. 178,287. Dated June 6, 1876; application filed May 25, 1876.

To all whom it may concern:

Be it known that I, RODMOND GIBBONS, of the city of San Francisco, in the State of California, have invented a new and useful Improvement in Pantaloons, and garments of a similar character, of which the following is a specification, reference being had to the accompanying drawing, forming a part hereof.

My invention relates to a fastening for the crotch in the fly of pantaloons or similar garments; AND IT CONSISTS IN BRIDGING SAID CROTCH WITH A CHECK-PIECE OF CLOTH OR OTHER INELASTIC PLIABLE MATERIAL, AS HEREINAFTER FULLY DESCRIBED.

The object of this invention is to prevent that tension at the crotch ordinarily produced either

REISSUE (p. 156).

Specification forming part of Reissued Letters Patent No. 9,616, dated March 22, 1881.

Original No. 178,287, dated June 6, 1876. Application for reissue filed February 19, 1881.

To all whom it may concern:

Be it known that I, RODMOND GIBBONS, of the city of San Francisco, in the State of California, have invented certain new and useful Improvements in Pantaloons and other Garments of a Similar Character; and I do hereby declare the following to be a full, clear and exact description thereof, reference being had to the accompanying drawings, forming part of this specification.

My invention relates to *means for strengthening the crotch in the fly of pantaloons*, and has for its object to prevent that tension at the crotch of the fly which is ordinarily produced, either by

by continued use of the garment, or by any undue strain caused by the assumption by the wearer of any posture of the body, or by the removal of the garment, calculated to produce such an effect.

The said improvement is applicable to all descriptions of pantaloons and garments of a similar character, its application to the garment adding greatly to its durability, by preventing the stretch of the cloth or stitching at the crotch.

To enable persons skilled in the art of manufacturing the garments to which my invention is adaptable, I describe the same as follows, referring to the annexed drawing.

Figure 1 is a view of the upper part of a pair of pantaloons, the front of the fly being turned down, so as to show the application of the improvement. Figs. 2 and 3 are, respectively, edge and face views, on an enlarged scale, of the fly extended so as to show the attachment of the improvement. Fig. 4 shows a modification in construction.

In Figs. 1, 2, 3 the button-strip of the fly is represented by *a*, and the buttons by *b*. The button hole strip is indicated by *c*, and between the button holes it is stitched to the front of the garment in the ordinary way. The lower end of the button-hole strip DOES NOT extend down and fasten into the crotch *d*, as in the common construction of pantaloons, but bridges over THE CROTCH, being securely stitched at *e* to the button-strip *a*. The button-hole strip is also firmly secured at *f* below the lower button-hole.

Fig. 4 shows, instead of the preferred construction EXHIBIT- continued use of the garment or by some undue strain upon the latter, caused by the assumption of some posture by the person wearing it or by some mode of removal of the garment from the body calculated to produce such an effect, *and which tension frequently operates to rupture either the cloth or the seam, or both, at the vicinity of the said crotch.*

To this end my invention consists in the use, in connection with the fly, of a check piece or strip of cloth or other inelastic pliable material, *arranged to bridge over and protect from tensional strain the crotch of said fly*, as will be hereinafter more fully described.

My said invention may be employed in the manufacture of all descriptions of pantaloons and other garments of a similar character, its application to such garments adding greatly to the durability *of the fly portion* thereof by preventing any stretch of the cloth or rupture of the stitching at the crotch *of the fly.*

To enable those skilled in manufacturing that kind of garments to which my invention is applicable, to make and use them with my said invention embodied therein, I will now proceed to more fully describe it, referring by letters to the accompanying drawings, in which—

Figure 1 is a *front* view of the upper part of a pair of pantaloons, *representing* the front of the fly as turned down for the purpose of more clearly illustrating the application thereto of my invention. Figs. 2 and 3 are, respectively, edge and face detail views of the fly portion only of the garment, drawn on an enlarged scale and with the fly distended, in order to more plainly

ED IN THE OTHER FIGURES, a separate piece of cloth serving as the bridge or check piece. This construction I deem to be within the scope of my invention.

My improvement, as seen in the manner preferred by me, adds nothing to the cost of the garment, but rather cheapens its manufacture, by causing the attachment of the lower end of the button-hole strip to be made at a point more easily reached than that at which the connection is ordinarily made.

Having described my invention, what I claim as new, and wish to secure by Letters Patent of the United States, is—

IN combination with the fly of pantaloons or similar garments, an inelastic bridge or check-piece, arranged across the crotch thereof, substantially as described, whereby the strain at the crotch, when the fly is opened and spread apart, IS RECEIVED BY SAID BRIDGE OR CHECK-PIECE, INSTEAD OF AT THE ANGLE OF THE CROTCH ITSELF.

In testimony whereof, I hereto subscribe my name this 22d day of May, A. D. 1876.

RODMOND GIBBONS.

Witnesses:

WM. T. HOWARD,

H. A. DANIELS.

show the improvement added thereto.

At Fig. 4 is shown a modified construction, in which the check-piece, instead of being integral with the button hole strip, is composed of a separate piece of cloth.

In Figs. 1, 2 and 3 the button-strip of the fly is represented by *a* and the buttons by *b*. The button-hole strip is indicated by *c, and between its button holes it is stitched at points* to the front of the garment in the ordinary way. The lower end of the button-hole strip *c is not merely* extended down into and fastened at the crotch *d*, as is the case in the common construction of pantaloons, but bridges over *and extends beyond* the crotch *d*, and is securely stitched to the button-strip *a*, as shown at *e*. The said button-hole strip is also very firmly secured *to the garment* below the lowest button-hole, as indicated at *f*.

At Fig. 4 is shown, instead of the preferred *form of my invention*, a construction in which a separate piece of cloth, c^2, serves as the bridge or check piece. This construction I consider *as involving the broad scope* of my invention; *for, although in this form, the button-hole strip has its lower end secured at the crotch d, the latter point is relieved of all strain when the fly is pulled open by the piece* c^2, *arranged as shown.*

My improvement *in the specific form seen at Figs. 1, 2 and 3, which show it carried out* in the manner preferred by me, adds nothing to the cost of the garment, *but, instead,* rather cheapens its manufacture, *since* the attachment *to the garment* of the lower end of the button-hole strip is effected at a point more

accessible than that at which the connection by stitching has heretofore been made.

It will be seen that in a pair of pantaloons made according to my invention, carried out in either of the forms shown, any extreme or sudden distention of the fly that would otherwise tend to strain and rupture it at the point d will come wholly upon the check-piece which extends across said point, and that thus the crotch d is perfectly protected against injury from the effects of any such strain.

Having now fully described my invention *in both the shown forms in which it may be practiced*, what I claim as new, and desire to secure by Letters Patent, is—

1. *The* combination, with the fly of a pair of pantaloons *or other* similar garment, *of* an inelastic bridge or check-piece arranged across the crotch *of the fly, and operating substantially as described, to receive any* strain occasioned by the spreading apart of the fly, and *which would otherwise be exerted upon the crotch of the fly.*

2. *In combination with the fly portion of a pair of pantaloons or other similar garment, a check-piece made integral with the button-hole strip of the fly, and adapted to prevent any tension at the crotch d that might operate injuriously upon it.*

In testimony whereof, I hereto subscribe my name this 18th day of February, 1881.

RODMOND GIBBONS.

In presence of—

JACOB FELBEL,

H. JANVIER.

At the outset or beginning of the specification, or that part of the specification where the subject matter of the invention is primarily stated, the invention is defined in these words:

> "My invention relates to a fastening for the crotch in the fly of pantaloons or similar garments, and it consists in *bridging* said crotch with a check piece of cloth or other inelastic pliable material; *as hereinafter fully described.*
>
> The object of the invention is to *prevent* tension *at the crotch,* * * * its application to the garment adding greatly to its durability by *preventing* the stretch of the cloth or the stitching *at the crotch.*"

The specification refers to four drawings in each one of which the "*bridge*" is clearly shown to be secured at two points only, *e* and *f*, both of these points being remote or distant from the crotch of the fly and so bridging and spanning the space between the two attaching points *e* and *f* without intermediate attachment or support at the crotch, precisely as a suspension bridge.

In short the original patent describes in its specification, shows in its drawings, and can claim only in its one claim, a piece of cloth bridging or *spanning* the fly opening *disconnected* from and above the fly crotch of a pair of pantaloons, so that a strainth at would tend to rupture the crotch of the fly, is received by this strip of cloth or "bridge" before it can reach the crotch, and which by its remoteness from the crotch, preserves the crotch from fracture.

The specification describes, and the drawings show, that this "bridge" may consist of a separate strip of cloth sewed to pantaloons of common construction, (in which the buttonholes trip extends down into the crotch), and referred to in Fig. 4, or, the bridge may be formed by turning the lower part of the buttonhole strip before it reaches the crotch across the fly opening, and sewing the end of this strip to the opposite side or button strip. The bridge being the same in both cases, both remote from the crotch and both arranged to leave a space between the bridge and the crotch. (John Earle, pp. 102 and 109, Q. 11, Record).

On the other hand, there issue by the newly added matter to its specification and its new second claim, seeks to broaden the scope of the invention, and patent, so that "by ingenious phraseology, the second claim, by excluding the specification and drawing, may be understood to include the reinforcement of the crotch *at* the fly, *irrespective of any peculiarity* of construction, and under such understanding of the claim to include the defendants overalls, and in this respect the second claim is materially different from the first claim. In comparing the original with the reissue, the opportunity for inserting this comprehensive second claim seems to have been the object of the reissue. (John Earle, defts' expert, p. 106, Q. 6, Record.)

Read the newly added second claim of the reissue:

> *"In combination with the fly portion of a pair of pantaloons, "or other similar garment, a check piece made integral with the "buttonhole strip of the fly, and adapted to prevent any tension "at the crotch d that might operate injuriously upon it."*

Observe that in the wording of the second claim, the element of the "*bridge*" is carefully eliminated, and the word "integral" made a feature.

The word "*integral*" is not found in the original description or claim, and nothing but a "*bridge*" is shown and described as a strengthening device.

This new and enlarged claim, attempts to bring within the scope of the reissue, every garment that has a reinforcing device made integral with the buttonhole strip of the fly, whether the reinforcing consists of a bridge or not and by so doing.

The case is made parallel with Hoskin *vs.* Fisher, 125 U. S., 217, in which this Court held:

> "It not being indicated in the original that the invention consisted in anything less than a combination of all the elements embraced in such single claim, and the delay not being explained, such claims were unlawful expansion of the original patent."

See also Coon *vs.* Wilson, 114 U. S., 268.
Ives *vs.* Sargeant, 119 U. S., 652.
Mahn *vs.* Harwood, 112 U. S., 354.

Eachus *vs.* Broomall, 115 U. S., 429.
Fay *vs.* Cordesman, 109 U. S., 408.
Hoffheims *vs.* Russell, 107 U. S., 132.
Yale Lock Co. *vs.* Sargent.
R. R. Co. *vs.* Mellon, 104 U. S., 112.
Sargent *vs.* Hall Lock Co., 114 U. S., 63.
Miller *vs.* Brass Co., 104 U. S., 350.
James *vs.* Campbell, 104 U. S., 356.
Yale Lock Co. *vs.* Greenleaf, 117 U. S., 554.

V.

THE DEFENDANTS' OVERALLS DO NOT INFRINGE THE ORIGINAL PATENT, AND CANNOT INFRINGE THE REISSUE, IF THAT REISSUE IS FOR A DIFFERENT INVENTION, OR HAS BEEN BROADENED OR INCLUDES THINGS NOT CLAIMED IN THE ORIGINAL.

The defendants do not infringe the original patent, nor do they infringe the reissue thereof in its terms. Nor can they infringe a reissue which is five years subsequent to the date of the original patent, with intervening public rights attaching thereto.

This elementary principle has been so often reiterated in substance in nearly all the recent decisions of the Supreme Court, touching the infringement of reissues, that it will not be necessary to refer to but few of these, for if, as is plain, a reissue is valid, it must be for the same invention that is claimed in the original patent, and if invalid for *any* reason, an invalid instrument is powerless to hold an infringer.

In

Newton *vs.* Furst & Bradley Co., 119 U. S., 373,

it was held that where

> "The defendants' machine did not infringe the original "patent, and the reissue was taken to cover it,"

the reissue was void.

The original patent granted to Gibbons is, as that instrument defines it, for an invention that consists in "bridging" the fly crotch "with a check piece of cloth or other inelastic pliable material; and it further states that the object of the invention is to prevent tension at the crotch" * * * "by preventing the stretch of the cloth or stitching at the crotch" * * * "and to enable persons skilled in the art of manufacturing the garments to which my invention is adaptable, I describe the same as follows, referring to the annexed drawing." * * *

> "*The buttonhole strip does not extend down and fasten into "the crotch as in the common construction of pantaloons, but "bridges over the crotch, being securely stitched at e, to the button "strip a. The buttonhole strip is also firmly secured at f, below "the lower buttonhole.*
>
> "Figure 4 shows instead of the preferred construction ex "hibited in the other figures a separate piece of cloth serving "as the bridge or check piece.
>
> "This construction I deem to be within the scope of my "invention.
>
> "My improvement as seen in the manner *preferred* by me, "adds nothing to the cost of the garment but rather cheapens "its manufacture *by causing the attachment of the lower end of "the buttonhole strip to be made at a point more easily reached "than that at which the connection is ordinarily made*" (*i. e.*, at the crotch).

And finally, the claim of this patent:

> "In combination with the fly of pantaloons or similar gar- "ments, an inelastic *bridge* or check piece, arranged across "the crotch thereof, substantially as described, *whereby the "strain at the crotch when the fly is opened and spread apart, "is received by said bridge or check piece,* INSTEAD OF AT "THE ANGLE OF THE CROTCH ITSELF."

Compare with this description and with this claim defendants' alleged infringing overalls, Defendants' Exhibit "E" (certified on the pocket by E. S. Renwick's signature as a duplicate of the alleged infringing garments put in evidence by complainant in its preliminary proof), and the first obvious thing is the entire absence from defendants' overalls of a bridge or check piece, "whereby the strain at the crotch when the fly is opened and spread apart is received by said bridge or check piece, instead of at

the angle of the crotch itself," and not only the entire absence of such bridge or check piece called for in the claim, is apparent; but you will fail to find any equivalent for such bridge or check piece "substantially as described" in the specification. You will also fail to find in the defendants' garments any device "to prevent tension at the crotch," which is stated to be the object of Gibbons' invention. You will also fail to find, and will note the entire absence of any device whatsoever, designed "to prevent the stretch of the cloth or stitching at the crotch." You will also fail to find that the attachment of the lower end of the button hole strip, "is made at a point more easily reached than that at which the connection is ordinarily made" (the crotch). (John Earle, p. 103, fol. 180, Record).

YOU WILL FIND, however, that in the defendant's garment the lower end of the buttonhole strip does extend down and is fastened into the crotch *d*. You will not find that this buttonhole strip is stitched at the point *f*, and remote from the crotch, or so that the point of stitching *f* limits its downward descent, and keeps the lower part of this buttonhole strip away from the angle of the crotch *d*, nor will you find that this buttonhole strip in the defendants' garment is at the point *f* deflected or turned so as to cross the fly opening and extend across this opening until its lower end is fastened to the button strip at a point *e*, and by that construction form a bridge to span the fly opening, leaving a clear, space between the angle of the crotch *d* and the under surface of this bridge so formed; nor will you find upon examining the defendants' garments that a separate piece of cloth, such as is shown in Fig. 4, is sewed to the buttonhole strip, and the button strip at points corresponding to the points *e* and *f* shown and described in the original patent or elsewhere, so that this separate piece of cloth shall bridge the fly opening at points remote from the angle of the crotch *d*, and so "prevent the stretch of the cloth or stitch-

ing at the crotch," nor will you find anything that can rightfully be considered the equivalent of a device to prevent the stretch of the cloth or stitching at the crotch, nor anything arranged across the crotch which is substantially like the described bridge "*whereby the strain at the crotch when the fly is opened and spread apart, is received by said bridge or check piece, instead of at the angle of the crotch itself, nor anything that can possibly be considered the equivalent of a bridge*" (Earle, p. 103, Record).

Again, looking at the defendants' overalls, you will discover that the bottonhole strip and the button strip in the defendants' garments, each of them, extend from the waistband downward and fasten into the angle of the crotch where these lower ends, by lapping each other to a small extent, are sewed together and so form the angle of the crotch itself. The lower ends of the buttonhole and button strips of the defendants' overalls each become therefore part and parcel of the crotch-angle and together they form, as stated, the crotch itself. You will find nothing in this construction of defendants' overalls to prevent the stretch of the cloth or stitching at the crotch, because, as is obvious, all the stretch of the cloth and the stitching caused when the fly is opened and spread apart is received at and only at the angle of the the crotch, since there is nothing to bear this strain at points remote from the crotch as with the bridge of complainants' patent. You will also find nothing in the construction of defendants' overalls to cheapen their manufacture by causing the attachment of the lower end of the buttonhole strip to be made at a point more easily reached than that at which the connection is ordinarily made (*i. e.*, at the angle of the crotch itself), because, as is obvious, and has been stated, and as we have already found, the lower end of the buttonhole strip of the defendants' overalls is carried down, sewed into and forms part of the angle of the crotch, no inelastic bridge or check piece in combi-

nation with the fly of pantaloons or otherwise being found arranged across the crotch thereof in any manner whatsoever, nor the equivalent of such construction, whereby the strain at the crotch when the fly is opened and spread apart is received by said bridge or check piece instead of at the angle of the crotch itself. It follows that the construction of the defendants' overalls is not the construction nor the equivalent of the construction that is described, claimed and pictured in the complainants' original patent.

Now, it must be clear, since none of the features of construction, described, shown and claimed in Gibbons' original patent, are found in the defendants' overalls, there could be no infringement of this original patent by the makers and sellers of such overalls, and if this original patent is not infringed the reissue in its terms and under the existing circumstances cannot be infringed according to the decisions of this Court.

If, therefore, the reissue of that original patent shall, in its description or claims, embody combinations, features or elements that are not found in the original patent and which embrace defendants' construction, then such elements, features or combinations, if incorporated in the reissued patent must either invalidate that reissue, because of the addition of such new matter; or if it should prove that the additions to the reissue were but the claiming of things that had not been claimed in the original patent, then the reissue would be for things that had been dedicated to the public for five years, and such a reissue could not be infringed.

See Ives *vs.* Sargent.
Coon *vs.* Wilson.
Mahn *vs.* Harwood.
Miller *vs.* Bridgeport Brass Co. and others,
all U. S. Supreme Court cases, above cited.

In considering, however, the question of the infringement of the reissued patent, the Court will observe that the complainant has relied solely upon the second claim of the reissue. Its counsel so inform the Court, so state in their brief, and the case has been argued before the Court on that basis. It is too late, therefore, to consider this case in any other aspect, even if the complainant wishes now to do so. This second claim is in these words:

> "In combination with the fly portion of a pair of panta-
> "loons, or other similar garment, a check piece made integral
> "with the the buttonhole strip of the fly, and adapted to pre-
> "vent any tension at the crotch *d* that might operate in-
> "juriously upon it."

If the second claim is to be interpreted by the drawings and specification of the original Gibbons Patent, and if the specification of the reissue is to be held in effect the same as the specification of the original patent, then the limitation imposed upon the terms of this second claim by interpreting it in this way, renders the infringement of this second claim by the defendants impossible, because inspection of the defendants' garment Exhibit "E," and the testimony of Mr. Earle, defendants' expert, show that the defendants' garments have not a bridge or check piece, remote from the crotch *d*, and spanning the fly opening from the two points *e* and *f*, at which two points only the bridge is attached to the fly opening, whether that check piece be made integral with the fly strip, or whether it be made of a separate piece of cloth as shown in Fig. 4 of the drawings.

Again, an inspection of the defendants' garment, as shown in their Exhibit "E," will show that the crotch is in itself formed by the cross or lapping together of the ends of both the buttonhole and button strips. It will show an entire absence of a "*check piece*," there is no such *piece*, there is no separate, specific, individual device, which must be the interpretation of the words "*check piece*" of this second claim. The "check

piece," therefore, of this claim, being as the words imply a distinct and specific thing in itself considered, the absence of such a specific individual thing from the defendants' garments must take them out of the second claim.

Again, an inspection of the defendants' garments, as shown in their Exhibit "E," clearly reveals that not only is the crotch of the fly constituted by the buttonhole and button strips, but it also clearly shows that any reinforcement at the angle of the crotch that the defendants' construction may have, is due as much to the button strip as it is to the buttonhole strip. Therefore you cannot find a check piece made integral with the buttonhole strip of the fly, and adapted to prevent any tension at the crotch *d*, that might operate injuriously upon it, but the button strip forms the angle of the crotch quite as much as does the buttonhole strip; and neither the buttonhole nor the button strip, considered individually, can be said to form a check piece adapted to prevent tension at the crotch *d*, and there can be no infringement.

If, on the other hand, the Court shall say that notwithstanding the well known rule laid down by the Supreme Court in its recent decision touching reissues, and long before such recent decision, this second claim of the reissue is entitled to an interpretation irrespective of the specification or drawings of the original patent, then this second claim is so comprehensive as to include inventions not described or shown in the original patent, and it is void for uncertainty and for attempting to comprehend inventions not described or shown, of whatever form, shape, or combination the construction may take, and so cut off subsequent inventors:

As in O'Reilly *vs.* Morse, 15 How., 62.

"It is impossible to understand the extent of this claim. "He claims the exclusive right to every improvement " * * * * If this claim can be maintained it matters not

> "how the result is accomplished. For aught that we know "some future inventor may discover a mode other than that "patented by Morse without using any part of the process or "combination set forth in the plaintiff's specification. But "yet, if it is covered by this patent, he could not use it, nor "the public have the benefit of it, without the permission of "the patentee. Nor is this all; while he shuts the door "against the inventions of other persons he would be able to "avail himself of new discoveries * * * And if he can "secure the exclusive use by this patent he may vary it with "every new discovery and development of the science, and "need place no description of the new manner, process, or "machinery, upon the records of the Patent Office. In fine, "he claims an exclusive right to use a manner and process "which he has not described, and indeed had not invented, "and, therefore, could not describe when he obtained his "patent. The Court is of opinion that the claim is too broad "and not warranted by law."

And since the days of O'Reilly *vs.* Morse this same principle has been reiterated time and again, as the Court knows, notably since 1882.

So that in conclusion, on this point, if the second claim of the reissue is to be limited by the specification and drawings of the original patent, then by that limitation there is no infringement on the part of the defendants, since the description and claims of the patent do not embrace the defendants' construction. And if the claim is not to be limited as stated, then it is void because of its indefinite comprehensiveness which enables it to cover subsequent inventions.

To quote

Eachus *vs.* Broomall, 115 U. S. 429,

> "The patent is plainly limited by its language to the con- "struction or arrangement and adjustment of the particular "parts of the machine described, for the use of which it is "declared applicable. * * On the other hand the reissue "is broad enough to cover every arrangement, combination "and adjustment in which these elements may be found, and "this, surely, is not the same invention as that described in "the original patent. The bill is dismissed."

VII.

State of the Art Considered.

The state of the art discloses that it is old, admittedly old, and was many years prior to Gibbons' application for his original patent to reinforce the angle of the fly, and the angle in the opening of skirts of coats, and the angle at the base of the fingers of gloves, and the angular seams of cushions, and rubber water bottles, by fixing to such several angles a strip of cloth more or less in length, so that that strip of cloth so fixed at the angle shall lie on or cover over the angle and extend also more or less on the sides of the angle or crotch; the stated and apparent purpose of fixing this piece of cloth in this way to the angle and crotch of what very well corresponds to the fly opening of a pair of pantaloons, being to unite the several pieces and seams that converge to form the angle, and to reinforce or strengthen the angle so formed. Examples of this admittedly old construction the Court will find in the following exhibits introduced in evidence by the defendants.

John E. Earle, defendants' expert (p. 144, Record), concerning these exhibits, says:

> 13 Q. Look at these three exhibits "marked respectively Defendants' Exhibits Short Tail Rubber Coat, November 1st, '86. Defendants' Exhibits Long Tail Rubber Coat, November 1, '86, and Defendants' Exhibit Ferguson, No. 1, December 21, '86," and state whether you find the openings in the skirt of the several exhibits reinforced or stayed, giving the construction and arrangement of the stays, the effect produced by the stay as you find it, and your reasons for any opinion you may express regarding the matters enquired about.
>
> A. I find in each of these coats the skirts constructed open in the back from the bottom upward, one side of the opening overlapping the opposite side in like manner as do the parts of fly front pantaloons.
>
> * * * * * *
>
> In the three exhibits to which I have referred, the crotch-staying pieces are secured to the respective sides in the usual manner of making seams or joints in India rubber goods.
>
> 14 Q. So far as the staying is concerned at the apex or crotch, as you call it, state whether you find in any of the

three exhibit coats last referred to any material difference ?

A. No, sir ; I do not. * * * (p. 145, Record).

16 Q. State whether you find in Exhibit Long Tail Coat that the buttonhole strip you have last referred to and the stay are integral ?

A. It is ; and the additional stay across crotch from the other side is also integral (p. 146, Record).

* * * * *

19 Q. Now what has these differences, in your opinion, to do with the stays or strengthening or reinforcing of the apex or crotch of the opening in the skirts of the two coats referred to ?

A. Nothing whatever. The stay is precisely the same in both as to construction and result.

20 Q. I believe you have stated, but kindly state again, whether in the three exhibit coats, "Long Tail," "Short Tail" and "Ferguson," you will find the stays in each of them secured close down into the apex or crotch in each instance.

A. I do.

21 Q. State whether you find in any of the exhibit coats last referred to a stay piece which is a bridge united at two points only to the opening, without intermediate points of attachment ?

A. Understanding a bridge to be the stay attached so as to span the crotch and leave the crotch free and open, there is no such bridge or stay in either of these exhibit coats.

22 Q. Referring to the three exhibit coats again, do you find any such bridge stay as is described and shown in Gibbons' original patent No. 178,287, Defts.' Ex. F.

A. No, sir; understanding the stay of that patent to be a bridge "which does not extend down and fasten into the crotch as in the common construction of pantaloons, but bridges over the crotch being securely stitched" to opposite sides and so as to leave an open space between the bridge and crotch when strain is brought between the two sides and bridge, there is no such bridge or stay in either of three exhibit coats.

23 Q. Refer to the overalls, Defendants' Exhibit E, March 30, '86, and which are identified by Mr. Renwick as duplicates in construction of the overalls of the defendant introduced by the complainant in his *prima facie* proofs, and state whether you find in that exhibit the stay or reinforcing of the crotch is immediately at and in close contact with the crotch, and in fact forming in part the crotch itself ?

A. I do (p. 146 Record).

24 Q. State whether in your opinion the reinforcing or strengthening of the skirt openings in Exhibits Long Tail, Short Tail and Ferguson Coats, strengthen the apex or crotch in the same manner, or in substantially the same manner, as does the reinforcement in the crotch of defendants' overalls, Defendants' Exhibit E ?

A. It is substantially in Exhibit E as in the coats referred to, differing only so far as the nature of the material is concerned, and no further.

25 Q. State whether it is within your knowledge, so far as the state of the art is concerned, common and necessary to strengthen garments, such as pantaloons, coats and other things, at the crotch or other angular openings of crotch-like form?

A. It is a common and in many cases a necessary practice to introduce a stay piece at the junction of two parts seamed together, and so that the said stay piece will take strain from the connecting seam or joint between the parts at the apex.

26 Q. State as to the antiquity of this common and necessary staying, as far as you know?

A. It dates back of my remembrance.

27 Q. State, if you can, whether the overalls, Defendants' Exhibit Rubber Overalls, Nov. 1, '86, shows one old and common method of strengthening garments at the crotch?

A. It does, the stay consisting in a piece applied at the junction of the leg seams and so as to overlap the cross seams, and by its connection with the adjacent part relieves the crotch seams from the strain which would otherwise be brought upon them.

28 Q. If you can, please state as to the antiquity of fly fronts having a buttonhole strip, such as is shown in Ferguson Ex. No. 1.

A. To the best of my recollection the fly front opening came into use in this country about 1843. At first the button hole strips were stitched to the front at its outer edge throughout its whole length; later; probably within five years, the close stitching of the outer edge was omitted and the button hole strip secured at the outer edge only at points between the button holes, and as in the Ferguson Exhibit Coat (p. 147).

All of the foregoing relates to the well known rubber water proof overcoats with a slit in the back of the tail or body of the coat. Such coats were old and in the market many years before Gibbons applied for his original patent. See testimony of Vermule, p. 114; Ferguson, p. 125; Hotchkiss, p. 111; Williams, p. 119; Ward, p. 131; and Benham, 137.

The further state of the art is shown in the following miscellaneous articles of well known manufacture, concerning which Mr. Earle says:

29 Q. Look at these exhibits of the defendant which are marked respectively Defendants' Ex. Chair Air Cushion,

Nov. 1, 1886; Water Bottle, Nov. 1, 1886; Defts.' Ex. D, Oct. 29, 1886; Defts.' Ex. E, Oct. 29, 1886; Defts.' Ex. Williams No. 1, Nov. 27, 1886; Defts.' Ex. A, Oct. 29, 1886; Defts.' Ex. B, Oct. 29, 1886, and state with particularity whether you find reinforced seams, angular or otherwise, and as to the construction and operation of such reinforced seams, giving your reasons for any opinion you may state? (p. 147).

Referring to Defts.' Exhibit Air Cushion,
" " " Water Bottle, and

Ex. D is a pair of India rubber gloves, having the apex or crotch between the several fingers and between the thumb and the body of the glove reinforced by an overlapping stay piece to strengthen the seams at those points, substantially like Defts.' Ex. Rubber Overalls.

Defts.' Ex. E. is another pair of India rubber gloves with the crotches stayed by an overlapping piece as in the last mentioned Ex. D.

Defts.' Ex. Williams No. 1 is a pair of India rubber overalls having the crotch stayed by an overlapping piece, substantially the same as Defts.' Ex. Rubber Overalls.

Defts.' Ex. A, as I understand it, is a section of a cushion, such as Defts.' Ex. Air Cushion, and illustrates the integral character of the two sides and the connection between them. The lining extends along one side to the apex of fold, thence returning to the other side.

Defts.' Ex. B is, as I undersfand it, a section from a similar cushion, showing the stay or tie at a point nearer the edge of the cushion than does Ex. A.

In all these exhibits there is the same integral character of the stay piece between the connected sides, and so that the said stay piece takes the strain, or its part of it, which would otherwise be wholly borne by the seams or joints connecting the parts.

30 Q. Now can you say, Mr. Earle, as an expert in such matters, in your opinion the several exhibits including all that have been before you to-day, illustrate examples in many instances different methods of staying seams, so that the seams may be strengthened and be enabled to bear undue strain?

A. I can, and do so state.

31 Q. And is it within your knowledge that seams and joints, angular or otherwise, in textile fabrics and other substances have been stayed, reinforced or strengthened by numerous other methods besides those shown in the exhibits referred to; if you answer yes, state how long you have known such other and various means of staying?

A. I do know of the common use of various kinds of stays for the crotch or apex of seams or joints, such, for illustration, as what is commonly called a "gusset," extra stitching, eyelets introduced through the parts at the apex, rivets introduced

at the same point, also clips; these I have known many years, I cannot say how long, but certainly before the filing of the application for the patent in suit, and some of them many years prior to that time (pp. 148, 149 Record).

Mr. Earle once again referring to the three rubber coats says:

32 Q. Again consider the reinforcements or stays in Exhibits "Long Tail," "Short Tail" and "Ferguson No. 1" coats, and state whether you find the stay or reinforcement therein the same or substantially the same as in the stay that is shown and described in Gibbons Reissue Patent of March 22, 1881, No. 9,616, on which this suit is brought?

A. Understanding the invention described and claimed in the said reissue patent to be a stay between the two sides of the front opening in the pantaloons, attached to the two sides at points above the apex or crotch, and so as to form a bridge over said apex or crotch and so as to leave a clear space between the crotch and the bridge, the two sides of the opening below the bridge and to the crotch being of greater length than the bridge, and that strain between the two sides is resisted by the bridge stay at points distant from the apex or crotch and independent of the crotch, I do not find such a stay in either of the three exhibit coats referred to in the question.

But if the second claim of the reissue patent is to be construed so broadly as to include the stay between the two sides at the front when the stay extends down and is fastened into the crotch, and so as to unite the two sides directly at the crotch, thereby omitting the bridge-like character of the stay, then I do find such a stay in each of the three exhibit coats.

I do not understand that the extension of the buttonhole strip, so as to form the stay as an integral part of the buttonhole strip, is an essential feature of invention, for the reason that the same bridge like stay is illustrated and described in the reissued patent made in a piece separate from and not integral with the buttonhole strip.

In the Ferguson No. 1 coat, however, there is the same integral character of the buttonhole strip and stay as that described and illustrated in both the original and Reissued Gibbons' Patents.

33 Q. Please consider the description and drawings of the bridge stay as in Gibbon's original patent No. 178,287, and as in the reissue thereof, No. 9,616, dated March 22, 1881, and state what importance, so far as the alleged invention is concerned, is given in said patents to making the stay and buttonhole strip integral, or of one and the same piece?

A. I have examined the two patents, original and reissue, and do not find in either an indication of any importance or advantage in making the buttonhole strip and stay in one and

the same piece; but on the contrary, *the original patent as well as the reissue, both state that the bridge stay may be made of a separate piece of material, and there is no indication in either patent that a separate stay does not possess all the advantages, as a stay, with the integral stay.*

The reissued patent distinctly states in speaking of the crotch, and in comparing the two stays that the crotch "is relieved of all strain when the fly is pulled open by the piece e^2, arranged as shown. The piece e^2 is the bridge stay made separate from the buttonhole strip."

34 Q. Inasmuch as the bridge stay in both the original and reissue patents is clearly shown as sewed through the buttonhole strip and the adjacent sides of the opening in the garment at the points *e f*, what possible difference does it make or can it make whether the stay and buttonhole strip are made in one and the same piece of cloth or not?

A. None whatever; if, for illustration the buttonhole strip of Figure 1 of either original or reissue, be cut off at the point *f*, the stay will remain precisely the same and possess every advantage as a stay, as it did before the strip and stay was separated (pp. 149, 150).

The Lubin Patent, Defendants' Exhibit "F." (p. 163.)

This patent was applied for nearly a year before Gibbons applied for his original patent, and so far as anything appears to the contrary in the record it anticipates Gibbon's invention to that extent if the second claim of the reissue is considered.

Concerning this exhibit, Mr. Earle, on p. 30, Defendants' Red., states:

12 Q. If you are familiar with and understand the matters contained in Letters Patent No. 303,578 granted to David Lubin, Aug. 12, 1884, the application for which was filed July 3, 1875, being Defendants' Exhibit "L," please state what you understand the invention to be as therein shown, described and claimed; state fully with your reasons for your statements.

A. I find the patent referred to to illustrate and describe certain improvements in overalls; the object of the invention, as stated in the specifications, is "to strengthen and re enforce those points, particularly the crotch seam at the fly opening at which the garment is liable to be ripped or torn in use," and the invention illustrated and described, as I understand it, consists of a single strip of material applied to the two sides of the front opening or fly, the said strip extending down one

side of the opening across the crotch and up the opposite side and so that the two sides of the opening are formed in one continuous piece, and so that as the strain comes upon the two sides and is thereby carried to the crotch, it will be resisted by the same continuous piece which crosses the crotch and so as to, in the words of the specification, "effectually prevent the garment from being ripped or torn at the bottom of the fly opening." The strip is stitched to the garment at every point throughout its length; the invention described and illustrated cannot be better recited than in the words of the claim which I quote—"pantaloons or overalls having a continuous strip extending down the sides of the fly or front opening and crossing the crotch seam at point of junction of the leg portions, said strip being attached to the garment at every point along its length."

PATENT OF ANDRUS—DEFENDANTS' EXHIBIT "M." (p. 164.)

This patent shows a reinforcing for the crotch, consisting of a piece of chamois skin, which is sewed across the seams and parts which constitute the crotch of the front opening.

PATENT OF HOWE—DEFENDANTS' EXHIBIT "N." (p. 165)

This patent recites the object of the invention is "to prevent strain and unpleasant tightness at the crotch. To that end I make a garment with an inserted piece or gusset between the legs, and in which the two fly pieces, *f* and *g*, lap the front point of the gusset piece *e*, serving to strengthen and protect it, so that it will be seen the strength is given where it is most needed." This lapping of the two fly pieces, *f* and *g*, occurs at the angle of the crotch of the fly in very much the same manner that the two corresponding pieces (the buttonhole and buttonstrip) do in the defendant's garments and for precisely the same purpose.

PATENT OF BRUCE, DEFENDANTS' EXHIBIT "O." (p. 167.)

This shows a reinforced crotch, and

PATENT OF TAYLOR, DEFENDANTS' EXHIBIT "P," (p. 163.)

shows the opening in a petticoat reinforced by a continuous strip.

The foregoing are the more important of the exhibits showing the state of the art that the defendants have introduced, and they all show various methods of reinforcing the crotch and fly crotch, all of them employing in some way pieces of inelastic material sewed down in, on, and over the angle of the crotch, excepting the device shown in the patent to Howe of August 8th, 1871, and that does not show a separate device for that purpose, but it does show and describe a construction very like that shown in the defendants' garments, that is to say Howe's parts *f* and *g* are lapped past each other at the crotch of the fly for the purpose of strengthening or reinforcing the crotch. All of these exhibits show beyond question that reinforcing and strengthening the fly-crotch of garments with strips or pieces that are integral with the sides of the fly opening, and with pieces that are separate from the sides of the fly opening were all old, well known and patented years before Gibbons applied for his patent. They all therefore establish beyond peradventure that the reinforcement of the fly crotch of garments, with or without buttonhole strips, is old.

VIII.

THE ORIGINAL PATENT OF GIBBONS' WAS VOID FOR LACK OF INVENTION AND PATENTABLE NOVELTY.

Gibbons' invention, I think, is unmistakably described and shown in the original patent to be nothing more nor less than adding to pantaloons a cross-tie, or check, or "*bridge*," as he calls it, that shall tie the two sides of the front opening of the pantaloons together, so that the extent to which this

opening may be pulled apart, is checked or limited by the length of this tie or bridge, and so states Mr. Earle, p. 29, Defts'. Red., his language being as follows:

> "The complainant simply takes an ordinary pair of overalls and supplies an adjunct in the shape of a bridge piece which spans the crotch as in Exh. Fig. 4, or, as in Exh. Fig. 1, he makes the bridge as a part of the buttonhole strip of the fly, instead of a separate piece, as in Exh. 4, and that is all he does. The gist of the invention being the same in both, to wit: the bridge or stay across, above and independent of the crotch. In both cases the crotch is substantially the old and well-known construction."

This check piece or bridge of the Gibbons' patent in other words, is practically nothing more nor less than a string which ties the two sides of the fly opening together, in precisely the same manner as does any piece of string tie any two objects together, to prevent those objects from separating beyond the limit of the length of the string, and Gibbons' bridge or check piece, produces no other result than that of preventing the opening of the front of the garment beyond the limit imposed by the length of his bridge or check-piece. The description and drawings of the so-called invention, show that its extent and scope can have no other function or purpose. Its application for the purpose of tying the two sides of the front opening of pantaloons, cannot lend or give to it importance or patentability. It performs the same function in precisely the same way, and produces exactly the same result, as does a piece of string under similar circumstances when applied to anything else. In short, all that Gibbons patents is a tether; a thousand familiar illustrations of which will occur to the Court; for example, the clewline in ship's rigging which is formed practically in the shape of the letter A, the cross-bar of the A representing the bridge or check piece, or, as sailors call it, the bridle; the strap attached to a trunk to prevent the top from falling back and straining the

portion than is given by the strength of the crotch seam or seams extending from the said apex downward.

PATENT OF TAYLOR, DEFENDANTS' EXHIBIT "P," (p. 163.)

shows the opening in a petticoat reinforced by a continuous strip.

The foregoing are the more important of the exhibits showing the state of the art that the defendants have introduced, and they all show various methods of reinforcing the crotch and fly crotch, all of them employing in some way pieces of inelastic material sewed down in, on, and over the angle of the crotch, excepting the device shown in the patent to Howe of August 8th, 1871, and that does not show a separate device for that purpose, but it does show and describe a construction very like that shown in the defendants' garments, that is to say Howe's parts *f* and *g* are lapped past each other at the crotch of the fly for the purpose of strengthening or reinforcing the crotch. All of these exhibits show beyond question that reinforcing and strengthening the fly-crotch of garments with strips or pieces that are integral with the sides of the fly opening, and with pieces that are separate from the sides of the fly opening were all old, well known and patented years before Gibbons applied for his patent. They all therefore establish beyond peradventure that the reinforcement of the fly crotch of garments, with or without buttonhole strips, is old.

VIII.

THE ORIGINAL PATENT OF GIBBONS' WAS VOID FOR LACK OF INVENTION AND PATENTABLE NOVELTY.

Gibbons' invention, I think, is unmistakably described and shown in the original patent to be nothing more nor less than adding to pantaloons a cross-tie, or check, or "*bridge*," as he calls it, that shall tie the two sides of the front opening of the pantaloons together, so that the extent to which this

opening may be pulled apart, is checked or limited by the length of this tie or bridge, and so states Mr. Earle, p. 29, Defts'. Rcd., his language being as follows:

> "The complainant simply takes an ordinary pair of overalls and supplies an adjunct in the shape of a bridge piece which spans the crotch as in Exh. Fig. 4, or, as in Exh. Fig. 1, he makes the bridge as a part of the buttonhole strip of the fly, instead of a separate piece, as in Exh. 4, and that is all he does. The gist of the invention being the same in both, to wit: the bridge or stay across, above and independent of the crotch. In both cases the crotch is substantially the old and well-known construction."

This check piece or bridge of the Gibbons' patent in other words, is practically nothing more nor less than a string which ties the two sides of the fly opening together, in precisely the same manner as does any piece of string tie any two objects together, to prevent those objects from separating beyond the limit of the length of the string, and Gibbons' bridge or check piece, produces no other result than that of preventing the opening of the front of the garment beyond the limit imposed by the length of his bridge or check-piece. The description and drawings of the so-called invention, show that its extent and scope can have no other function or purpose. Its application for the purpose of tying the two sides of the front opening of pantaloons, cannot lend or give to it importance or patentability. It performs the same function in precisely the same way, and produces exactly the same result, as does a piece of string under similar circumstances when applied to anything else. In short, all that Gibbons patents is a tether; a thousand familiar illustrations of which will occur to the Court; for example, the clewline in ship's rigging which is formed practically in the shape of the letter A, the cross-bar of the A representing the bridge or check piece, or, as sailors call it, the bridle; the strap attached to a trunk to prevent the top from falling back and straining the hinges; the rope supporting the arm of a derrick; the strip of webbing across the top of a camp chair

to limit the spreading apart of the sides of the chair beyond the length of the straps; a bar across from the trunk to the limb of a tree to relieve the breaking strain at the junction of the limb with the trunk; and familiar instances too numerous to recite will occur to the mind of the Court, as before stated.*

Where is the invention? It cannot be said that the invention lies in making this check piece integral with the buttonhole strip, because Gibbons says his invention is met by making it separate from the buttonhole strip, and because the buttonhole strip is not as such necessary to its construction for when his buttonhole strip is sewed at *f*, as in his patent so far as the bridge is concerned the function of the button-hole strip is ended, and the function and construction of the bridge begin just as markedly and distinctly as if they were separate and not of the same piece, and Gibbons recognizes this when he says the bridge may be made of a separate piece as in fig. 4.

Now if the construction and application and ...

*Corus. Roll Mill Co. v. Walker
54 Off Gaz. 10 p. 1415.
Pa. R.R. Co. v. Locomotive Co.
110 U.S. 490
Blake v. San Francisco.
113 U.S. 679.

... which are matters of common knowledge.

... tie, or check, or "*brace*" ... shall tie the two sides of the front opening of the pantaloons together, so that the extent to which this

The Court is referred to the Cross-Examination of Mr. E. S. Renwick, Complainant's Expert, pp. 34, 44.

13 x-*Q*. You concede, I believe, that the thing which is marked complainant's exhibit old construction represents one common, old and well known form of making breeches so far as the crotch is concerned?

A. So far as the mode of making the fly portion of breeches or pantaloons is concerned, the exhibit mentioned in the question is a substantially correct representation of a common, old and well known form of it as made previous to and since the date of the Gibbons patent.

15 x-*Q*. Do you find the seams in the exhibit referred to arranged or made in a manner that will prevent the ripping of the crotch part?

A. If by ripping in the question be meant what is generally understood by that term, viz.: the pulling out of the stitches or the cutting of them by a knife or scissors, there is nothing to prevent the ripping of the crotch part. If by ripping in the question be meant the rupture by a distending strain applied to the opening of the pantaloons, then *I find in the exhibit the stitches of the seams which resist the pulling apart of the portion of the garment to the extent of their strength, and if the strain be less than the strength of the stitches of the seams they will prevent the separation of the parts of the garment.*

16 xQ. Then do you wish to be understood as saying that you do not find any arrangement of seams or parts or construction in this exhibit, complainants' exhibit old construction, designed to give additional strength to the crotch of the exhibit apart from the ordinary construction arrangement or sewing?

A. I do not find in this complainants' exhibit old construction any arrangement or parts of construction designed to give additional strength to the crotch of the exhibit *apart from the ordinary construction arrangement or sewing which I have always seen in this class of garments at the same part.* Thus, there is in this exhibit the ordinary crotch seam or seams (there being sometimes one and sometimes two of these) extending from the apex of the crotch downward; and there is also in this exhibit the usual cross tacking, which I have seen in garments of this class at the upper end of the crotch seam or seams, and from the nature of the construction the extent of this cross tacking is limited, as in the ordinary construction previous to the date of the Gibbons patents.

17 xQ. And the purpose of this cross tacking is what?

A. *I understand that it is to strengthen to the extent of its strength the junction of the two parts of the garment at the apex of the crotch, i. e., to give the garment greater strength at that portion than is given by the strength of the crotch seam or seams extending from the said apex downward.*

to limit the spreading apart of the sides of the chair beyond the length of the straps; a bar across from the trunk to the limb of a tree to relieve the breaking strain at the junction of the limb with the trunk; and familiar instances too numerous to recite will occur to the mind of the Court, as before stated.

Where is the invention? It cannot be said that the invention lies in making this check piece integral with the buttonhole strip, because Gibbons says his invention is met by making it separate from the buttonhole strip, and because the buttonhole strip is not as such necessary to its construction for when his buttonhole strip is sewed at *f*, as in his patent so far as the bridge is concerned the function of the button-hole strip is ended, and the function and construction of the bridge begin just as markedly and distinctly as if they were separate and not of the same piece, and Gibbons recognizes this when he says the bridge may be made of a separate piece as in fig. 4.

Now if the construction and application and result of Gibbons' bridge lacks novelty for the reasons stated, it cannot be said that it is novel to prevent the ripping of the fly crotch of pantaloons by adding to that fly crotch reinforcing strips or a construction that shall reinforce the angle, because each and every one of the several exhibits referred to under the last heading show that strengthening and reinforcing this angle was old before Gibbons invented it, and that these methods vary commencing from a construction where the reinforcement is integral with the buttonhole strip as in Exhibit "Ferguson," and to all intents as in Exhibits "Long-tail" and "Short-tail" coats, to say nothing of the gloves and air cushions, and the several exhibit patents of the defendants heretofore named, and ending with numerous things which are matters of common knowledge.

ue, or check, or "*brai*
shall tie the two sides of the front opening of the pantaloons together, so that the extent to which this

The Court is referred to the Cross-Examination of Mr. E. S. Renwick, Complainant's Expert, pp. 34, 44.

13 x-*Q*. You concede, I believe, that the thing which is marked complainant's exhibit old construction represents one common, old and well known form of making breeches so far as the crotch is concerned ?

A. So far as the mode of making the fly portion of breeches or pantaloons is concerned, the exhibit mentioned in the question is a substantially correct representation of a common, old and well known form of it as made previous to and since the date of the Gibbons patent.

15 x-*Q*. Do you find the seams in the exhibit referred to arranged or made in a manner that will prevent the ripping of the crotch part ?

A. If by ripping in the question be meant what is generally understood by that term, viz. : the pulling out of the stitches or the cutting of them by a knife or scissors, there is nothing to prevent the ripping of the crotch part. If by ripping in the question be meant the rupture by a distending strain applied to the opening of the pantaloons, then *I find in the exhibit the stitches of the seams which resist the pulling apart of the portion of the garment to the extent of their strength, and if the strain be less than the strength of the stitches of the seams they will prevent the separation of the parts of the garment.*

16 xQ. Then do you wish to be understood as saying that you do not find any arrangement of seams or parts or construction in this exhibit, complainants' exhibit old construction, designed to give additional strength to the crotch of the exhibit apart from the ordinary construction arrangement or sewing ?

A. I do not find in this complainants' exhibit old construction any arrangement or parts of construction designed to give additional strength to the crotch of the exhibit *apart from the ordinary construction arrangement or sewing which I have always seen in this class of garments at the same part.* Thus, there is in this exhibit the ordinary crotch seam or seams (there being sometimes one and sometimes two of these) extending from the apex of the crotch downward; and there is also in this exhibit the usual cross tacking, which I have seen in garments of this class at the upper end of the crotch seam or seams, and from the nature of the construction the extent of this cross tacking is limited, as in the ordinary construction previous to the date of the Gibbons patents.

17 xQ. And the purpose of this cross tacking is what ?

A. *I understand that it is to strengthen to the extent of its strength the junction of the two parts of the garment at the apex of the crotch, i. e., to give the garment greater strength at that portion than is given by the strength of the crotch seam or seams extending from the said apex downward.*

pantaloons together, so that the extent to which this

18 xQ. At the close of your cross-examination prior to adjournment last Friday, you remarked that you presumed the trousers you had on and the trousers I had on had the same construction of crotch fastening as is shown in this exhibit, complainants' exhibit old construction, as an illustration of the commonness of such construction; state, if you can, approximately, how long you have known of this old construction referred to and shown in the exhibit named?

A. According to my recollection pantaloons with the single opening in front as distinguished from the previous mode of constructing them with a broad flap in front and an opening on each side, came into use when I was a boy at school, more than fifty years ago, but I have no recollection of noticing the exact mode in which pantaloons with the opening in front were than constructed. I recollect pantaloons made of the present construction with the simple opening in front, like complainants' exhibit old construction, previous to the year I left college, viz.: 1839; I recollect them particularly from the fact that, when putting them on in a hurry, I have frequently ruptured the stitching at the crotch by catching my foot in it, and have had to have the rupture sewed up.

19 xQ. This section, complainants' exhibit, old construction, that we have been discussing, is made with what you have hereto defined as a fly front, is it not?

A. It is.

20 xQ. In this exhibit, old construction, it appears to me that *the lower continuation of the button side of the opening and the lower continuation of the buttonhole side of the opening are placed one upon the other, so that the two sides of the opening referred to and the stitching therein pass or cross each other. Do you so find it?*

A. Yes; that is so, with the part to which the buttons are secured on one side and the part on the other side which covers over and conceals the buttonhole strip and the buttons when buttoned into that strip. *The buttonhole strip also has its lower end from the apex of the opening downward extended in between the two parts previously mentioned by me, so that it overlaps the side to which the buttons are sewed, and is overlapped itself by the other side of the garment.*

21 xQ. It appears to me that in this exhibit old construction, both the button side and the button-hole side of the opening are continuous from the places where each of these two sides commence at the waistband to and below the place where the lower prolongation of the button and buttonhole sides lap each other, as stated in your last answer; do you so find it?

A. Each of the sides of the opening, which I understand to be referred to in the question, viz., the side to which the buttons are attached and the opposite side which covers the buttonhole strip and conceals the buttons, when buttoned into that strip, is continuous from the waistband downward to and below the apex or angle of the opening, and conse-

quently throughout the whole extent of the opening from the waistband downwards.

22 xQ. Supposing that the garments having the construction of front or fly opening in the particulars we have been discussing and as the exhibit old construction shows, had first been made or sold subsequently to the date of June 6, 1876 (Gibbons' original patent), would such a garment, in your opinion, come within the descriptions and claim of that original patent as you understand it ?

A. Such garments would certainly not come within the claim of the said original Gibbons' patent, because they lack any check piece arranged across the crotch of the fly opening in front, and have no equivalent for such a check piece, and as such a check piece is a dinstinguishing characteristic of the improvement recited in the claim, such garments as those illustrated by Complainants' Exhibit "Old Construction," lack a distinguishing characteristic of the claim; such garments also would not come within the description of the part of the specification preceding the claim, so far as that description refers to and describes the construction recited in the claim, but the said garments would come within a part of the description which describes the common construction of pantaloons.

23 xQ. Suppose Mr. Renwick, you should take garments having the construction shown in Complainants' Exhibit "Old Construction," or, if you please, take that exhibit itself and add to it the bridge in the manner shown in Fig. 4 of Gibbons original patent so that the bridge would have precisely the construction, application and location as it is shown in Fig. 4, would you then say that the Exhibit "Old Construction," with this addition, would come within the said original patent, description and claim ?

A. I should say that the garment changed as described in the question would come within the said original patent, description and claim.

Look at Complainants' Exhibit "Old Construction," referred to by Mr. Renwick, and it at once becomes apparent, that the buttonhole strip and the button strip of the fly, extend from the waistband of the garment down to the fly crotch, where the lower ends of these two strips cross, or, as Mr. Renwick states, "lap each other," and by so doing they make the crotch of the fly, and the parts that lap or cross are sewed together by the "cross-taking" for the purpose, as Renwick states, and as is apparent, of strengthening the crotch of the fly, and that the parts that lap and strengthen the

crotch in this way are integral with the buttonhole and button strips. The next thing that will strike the Court upon an inspection of this "old construction" is the striking similarity between the old construction and the defendants' overalls, as shown in their Exhibit "E." In fact, they are alike in every respect, excepting that in the old construction the buttonhole and button strips cross each other to form the crotch of the fly, and in so doing present their lapping *edges* to the fly-crotch, while in the defendants' overalls the lower ends of these two strips lap or cross for the same purpose at the same place, but present at the angle their *flat* sides, instead of edges, and the conclusion that the Court will arrive at from this inspection is that if the Gibbons invention is found in the defendants' overalls, it must also be found in the old construction which is sworn to have existed forty-eight years ago. So that no novelty or invention can be imputed to the thing sought to be patented by the Gibbons patent in this case.

As in Gardner *vs.* Herz, 118 U. S., 180:

"A patentee must be an inventor and he must have made "a discovery; the statute has always carried out this idea, "referring to § 6 of the Act of July 4, 1836, 5 Stat., 119, and "§ 24 of the Act of July 8, 1870, 16 Stat., 201, and § 4886 of "the Revised Statutes; it is not enough that a thing shall be "new, in the sense that in the shape or form in which it is pro-"duced, it shall not have been before known, and that it "shall be useful, but it must, under the Constitution and the "Statute, amount to an invention or discovery. A thing "may be new in the sense that it has not been anticipated by "any previous invention, and it may be shown to have "superior utility and yet not be such an improvement as to "entitle it to be regarded in the patent law as an invention" "(citing Yale Lock Co. *vs.* Greenleaf, 117 U. S., 554). * *

"The fabric being old, the suggestion to construct chair "seats of out it, being old, the shaping of it in a former being "old, the perforation of a seat for ventilation and ornamenta-"tion being old, and the giving of a concave shape to a "wooden seat by pressure being old, there cannot, in view of "the disclaimers in the second reissue, be anything patenta-"ble in the structure. It was convenient to sell and con-"venient to buy, and commercially a good article. But a "patent cannot be taken out for an article, old in purpose

"and shape and mode of use, when made for the first time "out of an existing material, and with accompaniments "before applied to such an article, merely because the idea "has occurred that it would be a good thing to make the "article out of that particular old material." * *

"It is strenuously insisted that the popularity and success "achieved by the Gardner seat, affords cogent evidence both "of the utility and patentable novelty of his invention. The "answer to this argument is that the success of his seat is "probably due to a feature which is not suggested in the "original patent."

So in the case at bar. If Gibbons' overalls are as popular as he and others swear they are, that popularity is not due to Gibbons' bridge or check piece of the original patent, for it was shown that the complainant's licensees do not make the patented bridge piece, and the complainant did not put such construction in evidence, but the garment submitted by the defendants, obtained from the complainants' licensee and stamped with the date of the Gibbons patent, is totally different, and is more nearly like things that were old and well known in the market before Gibbons was born.

The Court, in Gardner *vs.* Herz, cites with approval Saxby *vs.* Gloucester Waggon Co. before Lord Coleridge and Justices Field and Bowen, in which case the Court said:

"The question is, whether the invention specified is such "a substantial improvement on what had already been "known and published as to render it the proper subject of a "patent. The specified patented combination did not before "exist, but it existed with the exception of two pieces of "mechanism, and their use for the purpose of doing what "they did in the combination was well known; but the "Court held that the combination might have been made by "any intelligent mechanical workman; that there was no "novelty sufficient to constitute an invention. That taking "two prior separate inventions together, every element of "the patent in question was to be found in one or the other of "those inventions, and it was held that the combination of "the two prior inventions did not require an exercise of such "an amount of skill and ingenuity as to entitle it to the pro-"tection of an exclusive grant."

The Supreme Court commenting on this case say that "it is "referred to for the purpose of showing that the question of "patentability, as depending on the quantum of inventive

"skill in a given case, is one which the courts of England "consider in a suit for infringement." See also, Penn. R. R. Co. *vs.* Locomotive Truck Co., 110 U. S., 490; Thompson *vs.* Boisellier, 114 U. S., 1.

From the foregoing it is submitted that as a matter of fact, Gibbons' original invention contained nothing that was patentable in any sense, but especially in view of the state of the art as disclosed and the rules laid down in Gardner *vs.* Herz.

Finally,

It is thought, the references heretofore made to the testimony are sufficient for the purposes of this brief, if indeed the consideration of the case will lead the Court beyond the questions touching the validity of the reissue and infringement.

The Court will clearly understand that in every pair of pantaloons there are *two* crotches, viz., the crotch of the fly and the crotch formed by the junction of the legs of the pantaloons.

Gibbons' original patent "relates to a fastening for the crotch *in the fly* of pantaloons, and that it consists in bridging *said crotch*, and to make this statement more certain the patent continues to specify that crotch as "*the crotch d*," and this crotch *d* of the fly is shown by the drawings to be the angle formed by the junction of the two sides of the fly opening. I refer to this point so that the Court may not be misled into supposing that this fly crotch of the original patent could possibly be mistaken for the crotch of the pantaloons, that is that other crotch which is formed by the junction of the legs of the pantaloons, so that the garment may fit into the crotch of the wearer. This leg crotch of the garment nowhere appears in the drawings of Gibbons' patent, because it is not the thing to which his patent relates, and because this leg crotch and the seams thereof are so located in the garment that the views exhibited by Gibbons' drawings could not show it. I believe the Court fully understands this

but I may be pardoned for mentioning it, and of course with this explanation the Court will understand that Gibbons' bridge is designed to protect the fly crotch *d* and its seam and stitching only, and not the leg crotch or its seams or stitching. Mr. Earle fully explains this in his cross-examination, to which the Court is referred.

It is clear to me that the complainants' counsel have conceded this case to the defendants by relying upon, and alleging the infringement of the second claim only of the reissue. They stated that the first claim is a generic one and also allege that it is substantially the same as that of the original patent, and that the second claim is a *limited* one, covering a check-piece when it is integral with a buttonhole strip. Now if this be so the subject matter of the limited second claim, must be included in the generic first claim, and if the generic first claim is not infringed as a whole, it is difficult to see how the second claim, which is only a part, can be infringed, unless it is a claim for something that is new and was not contemplated in the claim of the original patent, and if this be so the second claim is void, by their own showing.

It is submitted therefore that the bill in this case should be dismissed because:

1. The reissued patent contains new matter and is broader than the original patent and the invention warranted.

2. Five years having elapsed between the date of the original patent and the application for the reissue, the complainant has been guilty of *laches*, in connection with

3. The rights of the public which intervened.

4. The defendants did not infringe the original patent, and cannot infringe the reissue unless that reissue has been modified to bring them under it.

5. It is apparent that the reissue was obtained unlawfully, because the Commissioner of Patents exceeded his authority in granting it.

6. The second claim of the reissue, on which the complainant relies, is a claim for new matter not expressly claimed in the original claim, and it cannot stand therefore, even if the original description warranted such a claim, whether the second claim be a broadened or a contracted claim.

7. The second claim is broader in its terms than the original claim because it comprehends every kind of stay for the crotch opening that is integral with the buttonhole strip.

8. The original patent must be interpreted to be for a bridge or stay piece not fastened down into the crotch of the fly but remote therefrom, so that the strain is borne before it can reach the crotch.

9. The original patent prohibits and disclaims any other construction.

10. The original patent is for a thing which possesses no patentable novelty over any well known string or tie or tether employed from time immemorial to limit two objects on opposite sides from spreading beyond the length of the tether.

11. The original patent is for a thing which possesses no patentable novelty in view of the state of the art as exhibited by the defendants.

All of which is respectfully submitted.

New York, Feby., 1891.

GILBERT M. PLYMPTON,
Counsel for Appellee.

141-564
141-564

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1032~~. 691 ~~378~~ 59

THE FIRE INSURANCE ASSOCIATION, (LIMITED), PLAINTIFF IN ERROR,

vs.

JOHN W. WICKHAM, JUNIOR, AND WILLIAM B. COMSTOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED JULY 2, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1032.

THE FIRE INSURANCE ASSOCIATION, (LIMITED), PLAINTIFF IN ERROR,

vs.

JOHN W. WICKHAM, JUNIOR, AND WILLIAM B. COMSTOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation (omitted in printing)	2	–
Proof of service of citation (omitted in printing)	2½	–
Bond (omitted in printing)	3	–
Declaration (omitted in printing)	5	–
Rule to plead (omitted in printing)	15	–
Præcipe for appearance (omitted in printing)	16	–
Appearance of defendant (omitted in printing)	17	–
Plea and notice (omitted in printing)	18	–
Order that several suits abide decision in one (omitted in printing)	23	–
Trial (omitted in printing)	24	–
Verdict (omitted in printing)	26	–
Judgment (omitted in printing)	28	–
Certificate of division in opinion	29	1
Order that several suits abide decision in one	31	2
Facts found	32	3
Exhibit Q Q—Certificate of adjustment, Jan. 19, 1884	45	11
P P—Meeting of companies interested, Jan. 18, 1884	47	12
Questions certified	58	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 9, 1888.

	Original.	Print.
Charge of the court to the jury	60	18
Exhibit A—Agreement for submission to appraisers	76	26
Declaration	78	27
Plea and notice	88	32
Clerk's certificate (omitted in printing)	93	—
Stipulation as to printing record	94	34
Assignment of errors	96	36

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between John W. Wickham, Jr., and William B. Comstock, plaintiffs, and The Fire Insurance Association, Limited, defendant, a manifest error hath happened, to the great damage of the said Fire Insurance Association, Limited, defendant, as aforesaid, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, associate justice of the said Supreme Court, the 30th day of March, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk Circuit Court United States,
for the Eastern District of Michigan.

Allowed by—
H. B. BROWN.

[Endorsed:] 7232. John W Wickham, Jr., and William B. Comstock *v.* The Fire Insurance Association, Limited. Writ of error. Issued and filed March 30, 1888. Walter S. Harsha, clerk.

(Pp. 2 to 28, inclusive, omitted in printing as per stipulation of counsel. See p. 94.)

29 *Certificate of Division of Opinion.*

The United States Circuit Court for the Eastern District of Michigan.

JOHN W. WICKHAM and WILLIAM B. COMSTOCK, Plaintiffs,
vs.
THE FIRE INSURANCE ASSOCIATION OF LONDON, Limited, Defendants.

First.

On the twelfth day of November, 1884, the plaintiffs com-

menced a suit against the defendant in this court on two policies of insurance against fire on the propeller St. Paul, of which they were the owners, one of said policies being for the sum of $3,500.00 and the other for the sum of $1,500. Copies of the declaration and plea in said case are hereunto annexed and made a part of this record.

Second.

On the same day the plaintiffs commenced in this court suits against the following insurance companies on policies of insurance against fire on the same propeller St. Paul, and which suits are still pending in this court, and are as follows:

A. Against the Liverpool, London & Globe Insurance Company, on a policy of	$6,000 00
B. Against the Security Insurance Company of New Haven, Conn., on a policy of	2,500 00
C. Against the Exchange Insurance Co. of New York, on a policy of	2,500 00
D. Against the Mechanics' Fire Insurance Co. of New York, on a policy of	2,500 00
E. Against the Prescott Insurance Co. of Boston, on a policy of	2,500 00
F. Against the Greenwich Insurance Co., on a policy of	2,000 00

And on the 25th day of November plaintiffs commenced a suit in the same court against the Queen's Insurance Co. of Liverpool and London, on two policies of $3,500.00 each, and on the 24th of January, 1885, they commenced a suit in the same court against the German Fire Insurance Co. of Pittsburgh, Pennsylvania, on a policy of $3,500.00.

Third.

On the first day of April, 1885, the following entry and order was made in said circuit court in said cases:

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the first day of April, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

JOHN WICKHAM, JR., *et al. v.* THE GREENWICH INSURANCE CO.

JOHN WICKHAM, JR., *et al. v.* THE SECURITY INSURANCE CO.

JOHN WICKHAM, JR., *et al. v.* THE FIRE INSURANCE ASSOCIATION.

JOHN WICKHAM, JR., *et al. v.* THE MECHANICS' INSURANCE CO.

JOHN WICKHAM, JR., *et al.*

v.

THE LONDON, LIVERPOOL & GLOBE INSURANCE COMPANY.

JOHN WICKHAM, JR., *et al. v.* THE PRESCOTT INSURANCE CO.

JOHN WICKHAM, JR., *et al. v.* THE QUEEN'S INSURANCE CO.

In these causes, on motion of Blodget & Patchin, attorneys for the

defendants, after hearing Mr. G. V. N. Lothrop, of counsel for the plaintiffs, in opposition thereto, it is ordered that all the above-entitled causes abide event and final determination of that one of said causes in which the plaintiffs may elect to prepare the evidence and go to trial, and that if verdict and judgment in the case so tried shall be in the favor of the plaintiffs, verdict and judgment shall be entered against each of the several defendants in the above-entitled causes for such damages as might be awarded on verdict for plaintiffs in each of said causes, if tried; and that if verdict and judgment in the cause so elected to be tried by plaintiffs as above provided be in favor of the defendant therein that verdict and judgment be also entered in each of said above-entitled causes in favor of the several defendants above named, provided, however, that nothing in this order or in the judgment which may be entered in any or all of said causes shall affect or impair the rights of the parties, plaintiffs or defendants, in each of said causes to move for a new trial thereof, to take out a writ of error, or otherwise review all such judgments as may be entered under this order. The court reserves the right to qualify or modify this order hereafter.

32 Fourth.

The trial of this case came on before a jury on the 8th day of November, 1887, Hon. Howell E. Jackson, circuit judge, presiding, and associated with him was the district judge, Hon. Henry B. Brown.

The following facts appeared upon the trial:

First.

The plaintiffs in 1883 were the owners of the steamer St. Paul, engaged in navigating the Great Lakes, and the plaintiff, Wickham, was the managing owner.

Second.

They obtained upon said steamer fire insurance policies to the amount of $40,000.00, distributed as follows:

Continental, of New York	$7,500 00
Liverpool & London & Globe	6,000 00
Fire Insurance Association, 2 policies	5,000 00
Queen's Insurance Co., 2 policies	7,000 00
Security Insurance Co. of New Haven	2,500 00
Exchange Insurance Co. of New York	2,500 00
Mechanics' Fire Insurance Co. of New York	2,500 00
German Fire Insurance Co. of Pittsburgh	2,500 00
Prescott Insurance Co. of Boston	2,500 00
Greenwich Insurance Co. of New York	2,000 00
Being in all	$40,000 00

33

Third.

The plaintiffs also had $45,000.00 of insurance by marine policies on the same vessel at the same time.

Fourth.

In all of these policies save one, viz., the Liverpool & London & Globe Insurance Company, it was provided that in case of loss by fire the loss should be payable in 60 days after the proof of loss had been filed with the companies. The provision in the policy of the company named was as follows:

When property is damaged the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of the loss or damage shall be determined by agreement between the company and the assured; but if at any time differences shall arise as to the amount of any loss or damage, or as to any question, matter, or thing concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement, and the award, in writing, of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted, but shall not decide the liability of this company;

34 and until such proofs, declarations, and certificates are produced and examination and appraisals permitted the loss shall not be payable. There can be no abandonment to the company of the property insured, but the company reserve the right to take the whole or any part thereof at its appraised value: And provided further, That it shall be optional with the company to repair, rebuild, replace, or restore the property lost or damaged within a reasonable time, giving notice of their intention so to do within thirty days after the receipt of the proofs herein required.

Fifth.

On the 10th day of November, 1883, while said propeller St. Paul was on the voyage from the lower lakes to Lake Superior, a fire broke out in the hold of said vessel, and, although proper efforts were made, the fire could not be extinguished, and to save the vessel and cargo the vessel was scuttled and sunk, and the fire thus extinguished. She was subsequently, at considerable expense, raised and brought to Detroit for the purpose of repairs, &c., where she arrived on the 19th day of November, and immediately commenced to discharge her cargo. On the 24th of November, at Detroit, while her cargo was being unladen in order to make such necessary repairs on said propeller, a fire broke — in her hold and could not be

extinguished, and she was again sunk for the purpose of saving the vessel and cargo, and was afterwards raised at considerable expense.

Sixth.

On the 15th day of December, 1883, a written agreement was entered into between the plaintiffs and the adjusting agents of
35 the several insurance companies for the purpose of adjusting the amount of the loss caused by said fires to the hull of said vessel, including tackle, awnings, furniture, engine and boiler connections, and appurtenances thereto belonging, a copy of which agreement is hereto attached, marked Exhibit A.

Seventh.

The adjustment under this agreement of the direct loss by fire was completed December 26, 1883. Formal proofs of loss were also sent from Buffalo by the adjusting agent of the companies on the 12th day of January, 1884, to the several insurance companies, at their offices at New York, and were received in due course of the mail. The amount of the loss, according to the report of said appraisers, exclusive of the expense of raising and saving said boat and cargo, thus adjusted, aggregated $15,364.78. The adjusting agent, in sending said proofs of loss to the companies, accompanied the same with the following letter to each of the companies, viz:

W. B. Allen, General Fire-Adjusting and Supervising
Insurance Agent, No. 29 Irving Place,
BUFFALO, *January 12th*, 1884.

GENTLEMEN: I enclose herewith proofs, Jno. W. Wickham, Jr., managing owner, for loss and damage prop. St. Paul, which I trust will be found satisfactory:

The claim as made covers only the loss and damage by fire and water, as per agreement, on the tackle,	
36 awnings, apparel, furniture, &c., of	$1,735 08
And the appraisers award on hull, engines, mach'y, &c., of	13,629 70
Aggregating in all	$15,364 78

The assured will make further claims for expenses of raising the propeller, and is now preparing the statement of such expenses to submit with his subsequent claim.

Yours truly, W. D. ALLEN, *Adjuster.*

Eighth.

The amount of the loss thus adjusted and proved was proportioned as follows:

Continental Insurance Co.	$2,880 90
Liverpool & London & Globe	2,304 70
Fire Insurance Association, 2 policies	1,920 60
Queen's Insurance Co., 2 policies	2,688 84

Security Ins. Co. of New Haven	960 30
Exchange Ins. Co. of New York	960 30
Mechanics' Fire Ins. Co. of New York	960 30
German Ins. Co. of Pittsburgh	960 30
Prescott Ins. Co.	960 30
Greenwich Insurance Co.	768 24
In all	$15,364 78

37 Ninth.

At the trial it was admitted that the cost of raising and saving the vessel was upwards of $15,000.00. The plaintiffs admitted that they had been paid the cost of repairing the vessel as set forth in the proofs of loss prepared and forwarded to the companies as aforesaid, but claimed that they had not been paid any part of the cost of raising and saving the vessel; that before the commencement of this suit they demanded payment thereof, which was refused, the insurers denying liability therefor, and the same remains unpaid.

The defendants claim that the payment of the cost of said repairs was made by way of accord and satisfaction of the plaintiffs' entire claim, and offered in evidence the following receipts:

$1,344.42. JANUARY 19, 1884.

Received from the Fire Insurance Association of London, England, thirteen hundred & fourty-four $\frac{42}{100}$ dollars, it being in full of all claims and demands for loss or damage by fire which occurred on the 10th and 24th days of November, 1883, to property insured by policy No. 180,617, Buffalo, New York, agency, and in consideration of said payment said policy is hereby cancelled and surrendered to said company, and all further claims by virtue of said policy forever waived.

(Signed) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per WICKHAM.

Claim	$1,344 42
Discount	
Draft	8

38 There was also a receipt endorsed upon the policy No. 180,617 as follows:

JANUARY 19TH, 1884.

In consideration of four $\frac{47}{100}$ dollars, return premium, the receipt of which is hereby acknowledged, this policy is cancelled and surrendered to the Fire Insurance Association (Limited) of England.

(Signed) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per WICKHAM, JR.

The other receipt given to the Fire Insurance Association is precisely like the first, except as to the No. of policy and the amount, and is as follows:

$576.18. JANUARY 19TH, 1884.

Received from the Fire Insurance Association of London, England, five hundred & seventy-six $\frac{18}{100}$ dollars, it being in full of all claims and demands for loss or damage by fire which occurred on the 10th and 24th days of November, 1883, to property insured by policy No. 181,252, Buffalo, N. Y., agency, and in consideration of said payment said policy is hereby cancelled and surrendered to said company, and all further claim by virtue of said policy forever waived.

JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per WICKHAM, JR.

Claim ---------- $576 18
Discount ----------
Drafts ---------- $

39 The endorsement on the back of said policy was precisely the same as that on policy No. 180,617, except as to the amount.

Defendants' counsel then offered in evidence the following receipts given to other companies:

$960.30. N. Y., *Jan.* 19, 1884.

Received of the Mechanics' Fire Insurance Company of Brooklyn, N. Y., in full satisfaction of all claims and demands upon said company for loss and damage by fire on the twenty-third day of November, 1883, to property, consisting of the hull of the prop. St. Paul, with all machinery, connections, and appurtenances, situate as described, and insured by said company by policy No. 238,753, renewal No. —, and in consideration thereof said company is hereby discharged forever from all further claims by reason of said fire, loss, and damage, and said policy of insurance is hereby assigned, with all claim thereunder, to said company, and said policy is hereby cancelled in full and surrendered to said company.

Witness hand and seal.

JOHN W. WICKHAM, JR. [SEAL.]
Managing Owner.
W. B. COMSTOCK,
Per JOHN W. WICKMAN, JR.

Witness:
FRANK E. BLAKE.

Claim ---------- $960 30
Interest ----------

$960 30
Returned premium---- 6 71

$967 01

NEW YORK, *Jan'y* 19, 1884.

To the Queen's Insurance Co.:

Received of the Queen's Insurance Company of Liverpool, through J. A. MacDonald, manager, thirteenth hundred and forty-four $\frac{42}{100}$ dollars in full payment and satisfaction, as per compromise settlement, for all loss and damage by fire which occurred on the eleventh day of November, 1883, to property insured under policy No. 63718, renewal No. —, issued at the Buffalo, N. Y., agency, and in consideration of such payment the said policy is hereby cancelled and surrendered.

$1,344.42.

(Signed) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per JOHN W. WICKHAM, JR.

The other receipt to the Queen's was in precisely the same terms, except as to the number of the policy. The amount covered by these two receipts was paid to the plaintiffs by a draft, of which the following is a copy:

QUEEN'S INSURANCE COMPANY,
No. 3354. NEW YORK, *Jan'y 19th*, 1884.

Pay to the order of J. W. Wickham, Jr., managing owner, and W. B. Comstock twenty-six hundred and eighty-eight $\frac{84}{100}$ dollars, being in full of all claims and demands against this company, as per compromise settlement, for loss and damage by fire on the eleventh day of November, 1883, to property insured under policy Nos. 63718 and 63743, of Buffalo, N. Y., agency.

$2,688.84.

(Signed) J. A. MACDONALD, *Ag't.*

To the Queen's Insurance Company, 37 and 39 Wall St., New York.

This draft was endorsed as follows: (Signed) John W. Wickham, Jr., managing owner; W. B. Comstock, per Wickham, Jr.

DATED AT NEW YORK, *January* 19, 1884.

To the Liverpool and London and Globe Insurance Co.:

Received of the Liverpool and London and Globe Insurance Company, by the hand of J. E. Pulsford, res't manager, a sight draft for the sum of two thousand three hundred four & $\frac{70}{100}$ dollars, which, when paid, will be in full compromise and payment of all claims and demands upon said company for loss and damage by fire which occurred on or about November 10 & 24, 1883, to property insured under policy No. 2,635,343, ren'l 9302, the same being reduced in like amount. The original being lost, it is hereby cancelled in full subject to return premium.

$2,304.70.

(Signed) JOHN W. WICKHAM, JR.,
Managing Owner.

This amount was paid by a draft, of which the following is a copy, which draft is indorsed, J. Wickham, Jr., managing owner:

$2,304.70. NEW YORK, *Jan'y 19th*, 1884.

At sight pay to the order of J. W. Wickham, Jr., managing owner, the sum of twenty-three hundred & four $\frac{70}{100}$ dollars, which is in full payment of all claims for loss and damage caused by fire occurring on the 10th and 24th days of November, 1883, to
42 property insured under policy No. 2,635,343, renewal No. 9302.

(Signed) J. E. PULSFORD,
Res't Manager.

To the Liverpool & London & Globe Insurance Company, 45 William street, New York.

$960.30. 1884.

To the Security Insurance Co. of New Haven, Conn.:

Received of the Security Insurance Co. of New Haven, Conn., through the home office, at New Haven, Conn., the sum of nine hundred and sixty $\frac{30}{100}$ dollars, being in full satisfaction and settlement of all claims and demands for loss or damage by fire which occurred on the 10th and 24th days of November, 1884, to property insured by policy No. 3272–1765, renewal No. 1765, and in consideration of said payment this policy is hereby cancelled and surrendered to the company.

(Signed) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per WICKHAM, JR.

NEW YORK, *Jan'y* 19, 1884.

To the Greenwich Insurance Co.:

Received from the Greenwich Insurance Company seven hundred and sixty-eight $\frac{29}{100}$ dollars in full settlement for all claims for loss and damage on the 23rd day of November, 1883, to prop-
43 erty insured under policy No. 500,260, being on steamer St. Paul.

$768.29.

(Signed) JOHN W. WICKHAM, JR.,
Managing Owner St'r St. Paul.

$960.30. AGENCY AT BUFFALO, N. Y., *Jan'y 22d*, 1884.

To the Prescott Insurance Co.:

Received of the Prescott Insurance Company of Boston, Mass., through Smith & Davis, agents of said company, the sum of nine hundred sixty and $\frac{30}{100}$ dollars, being in full for all claims and demands for loss and damage by fire on the 24th day of November, 1883, under policy No. 1200, issued at Buffalo, N. Y., agency of said

company, and in consideration of said payment said policy is hereby surrendered to the company.

(Signed) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per J. W. WICKHAM, JR.

This amount was paid by a draft, of which the following is a copy:

$960.30. BUFFALO, N. Y., *Jan'y* 22, 1884.

At sight pay to the order of Jno. W. Wickham, Jr., managing owner, and W. B. Comstock nine hundred sixty & $\frac{30}{100}$ dollars, being in full satisfaction for loss under policy No. 1200, issued by your agent at Buffalo, N. Y.

(Signed) SMITH & DAVIS, *Agents.*
JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per J. W. WICKHAM, JR.

To Prescott Insurance Co., Boston, Mass.
This draft was indorsed.

44 The following is a copy of the receipt given to the German Fire Insurance Co., and also of the draft given by said company to the plaintiffs in payment thereof, which draft is on the same paper with the receipt and has never been separated therefrom:

Received from Wm. D. Lewis, agent of the German Fire Insurance Company of Pittsburgh, Pa., a sight draft on said company for the sum of nine hundred & sixty $\frac{30}{100}$ dollars, interest being deducted for payment in advance of maturity, which when paid will be in full for all claims on said company for loss and damage by fire on the tenth day of November, 1883, to property insured under their policy No. 20465, renewal No. 40343, Buffalo, N. Y., agency; and the said company, in consideration of the premises and of one dollar to us paid, the receipt of which is hereby acknowledged, is hereby discharged forever from all further claims by reason of said fire under said policy of insurance, excepting only the obligation to pay said draft.

In consideration of said payment the policy is hereby cancelled and surrendered to company.

Witness our hands this 31st day of January, 1884.

JOHN W. WICKHAM, JR., [SEAL.]
Managing Owner.
W. B. COMSTOCK,
Per JOHN W. WICKHAM, JR.

Witness:
M. J. BOURKE.

Amount of loss	$960 30
Interest deducted	$
Amount of draft	960 30

45 $960.30. PITTSBURGH, PA., *Jan'y 24th*, 1884.

Pay to the order of Wickham & Comstock nine hundred & sixty $\frac{30}{100}$ dollars for loss and damage by fire on the 10th day of November, 1883, to property insured under policy number 20465–10343, of Buffalo, N. Y., agency.

C. BARCHFELD, *President.*
F. L. GROSS, *Secretary.*
P. E. KOHLER.

To the German Fire Insurance Co., corner of Wood street and 6th Ave, Pittsburgh, Pa.

Defendants' counsel also offered in evidence the following paper:

EXHIBIT Q Q.

NEW YORK, *January 19th*, 1884.

This is to certify that the loss and damage by fire which occurred on the 23rd day of November, 1883, to the steamer St. Paul, is this day adjusted for the sum of fifteen thousand three hundred and sixty-four and $\frac{78}{100}$ dollars ($15,364.78), payable without discount upon presentation of the policies to the several companies interested by the assured, and apportioned among the several companies as follows, viz:

46

	Insures.	Pays.
Continental, of New York	$7,500 00	$2,880 90
London & Liverpool & Globe	6,000 00	2,304 70—Paid.
Fire Insurance Association	3,500 00	1,344 42—Paid.
Queen's, of England	7,000 00	2,688 84—Paid.
Fire Ins. Ass'n, 2nd policy	1,500 00	576 18—Paid.
Security, of New Haven	2,500 00	960 30—Will remit.
Exchange, of New York	2,500 00	960 30—Paid 1, 19, '84.
Mechanics', of New York	2,500 00	960 30—Paid 1, 19, '84.
German, of Pa.	2,500 00	960 30—Will remit.
Prescott Insurance Co.	2,500 00	960 30—Remitted.
Greenwich, of New York	2,000 00	768 24—Paid 1, 19, '84.
	$40,000 00	$15,364 78

(Signed), JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per JOHN W. WICKHAM, JR.

JOHN K. OAKLEY,
J. H. WELLMAN,
Committee.

Tenth.

The defendant having rested, the plaintiffs, in rebuttal, offered evidence tending to show that in January, 1884, said Wickham went to New York; that on the 18th of January a meeting of the companies interested in said loss was held at the board rooms in New

York, at which meeting Messrs. Wellman & Oakley were appointed as a committee to confer with the plaintiff in regard to said loss. Of this meeting Wickham had no notice and was not present; that on the following day said Wickham met said Wellman and
47 Oakley, and was notified by them that they were appointed as such committee, and that the companies were ready and willing to pay the expense of making the repairs occasioned by said fire, as set forth in the proofs of loss hereinbefore mentioned.

That Wickham called attention to the claim for raising and saving the vessel, stating that he expected to get a contribution to such expense from the owners of the cargo of said vessel upon a general average, and for the sake of settlement offered to share the balance of such expense with the fire insurers in the proportion that the uninsured interest in the steamer bore to the amount insured; that the committee replied that the companies were not liable for such expense, and that they had no authority whatever to consider the claim for raising and saving the steamer, and thereupon gave to said Wickham the following paper, marked Exhibit P P, stating to him that the same was a record of the proceedings of the meeting at which they were appointed such committee, and that their authority was limited by the terms of the resolution adopted at such meeting and set forth in said exhibit, and that they could not go beyond it or consider this claim for raising and saving the vessel even if they were disposed to do so.

The paper referred to is as follows:

EXHIBIT P P.

BOARD ROOMS, *January* 18, '84.

Meeting of the companies interested in loss on propeller St. Paul. Present:

48 Continental	$7,500 00
Fire Ins. Ass'n	5,000 00
Queen's	7,000 00
Exchange	2,500 00
Mechanics', N. Y.	2,500 00
Greenwich	2,000 00
	$26,500 00

Organized by Mr. Wellman, chairman.

Communication from Jno. M. Murray, adjuster, at Detroit, in relation to expenses incurred in saving propeller St. Paul.

On motion, duly seconded—

That the request of the assured to help him out is not granted, but the companies are recommended to pay the amount of claim as set forth in the proofs of loss. Carried.

Meeting adjourned.

(Signed) G. W. MONTGOMERY.

On motion, the action of the meeting be referred to a committee of two for the purpose of conference with the owner. Carried.

Chair appointed Mr. Oakley and Mr. Wellman.

A part of this paper was in the handwriting of Wellman.

Plaintiff offered evidence tending to show that said committee further stated that the companies were satisfied with the adjustment and proofs of loss, and were ready and willing to pay the cost of making the repairs to said steamer necessitated directly by the fire without discount, and would waive any rights they might have under
49 the policies making the loss payable in sixty days from the time the proofs were furnished. The plaintiffs were never requested to compromise or release their claim for the expense of raising and saving the vessel, nor was the release or compromise of said claim spoken of except by Wickham when he offered to settle, as hereinbefore stated, which offer was declined by said committee, as above stated, upon the ground that they had no authority to consider the matter.

Plaintiffs also offered evidence to show that at said interview Mr. Oakley, in behalf of the Mechanics' Ins. Co., gave to Wickham a check for the amount of the loss adjusted as aforesaid against the company, being $960.30, and Wickham then signed the aforesaid receipt for that amount to said company; and, after the receipts were signed and delivered, said paper, Exhibit Q Q, was prepared under the direction of said Oakley and given to Wickham to exhibit to the representatives of other companies, to show the amount of said adjusted loss which had been apportioned against said companies respectively.

50 Eleventh.

The defendant objected to the introduction of this parol testimony tending to contradict the receipts and drafts given in evidence and the certificate of January 19th, Exhibit Q Q, showing the apportionment of the loss to be paid by the several companies, upon the ground that such evidence was not admissible in the absence of fraud, misrepresentation, and mistake. These objections were overruled by the presiding judge and the evidence was received and submitted to the jury.

Twelfth.

The defendant then introduced testimony to prove—and on this point there was no conflict as to what actually took place at the board meeting—that at the board meeting, after the resolution was passed that they could not help out the plaintiffs, but all the companies were recommended to pay the amount claimed as set forth in the proofs of loss, and the appointment of the committee of Messrs. Oakley and Wellman to confer with the plaintiffs, Mr. Oakley refused to serve on such committee under any restrictions, and moved as a substitute that it be referred to the committee with full power, and this was carried.

The defendant's testimony by two witnesses, Oakley and Wellman, as to what took place at the meeting with the plaintiff Wick-

ham, on the 19th of January, is in direct contradiction with the testimony of Wickham, given above, on the following points:

51 1. They did not state that they had no authority whatever to consider the claim for raising and saving the steamer.

2. They did not admit that they were ready and willing to pay the expenses of making the repairs occasioned by the fire set forth in the proofs of loss.

3. They did not deny their liability for raising and the vessel and cargo, but stated expressly that they would neither admit nor deny their liability upon either of said claims.

4. They deny that they said that they were satisfied with the proofs of loss. On they contrary, they criticised such proofs and made suggestions expressive of their doubts as to their liability upon such proofs.

5. They deny that they or either of them ever handed to said Wickham the paper put in evidence purporting to be the proceedings of the board meeting, or that said paper was presented at that time or seen by either of them. Oakley testified that he never saw the paper until he saw it in court, and Wellman testified that he had seen a portion of it, but not the entire paper until it was thus produced.

6. They deny that Wickham was never desired to compromise and release his entire claim.

That, on the contrary, they insisted that the whole matter should be settled or that nothing whatever would be paid. They stated to him that they — 60 days from the time of receiving the proofs

52 of loss within which to pay the claim if it was a valid one; and they said to him if you will close up the entire matter, surrender the policies, we will pay you the sum claimed in the proofs of loss. That he replied, I am very anxious to get this closed up and to get the money. I want to get back to my business. I owe bills for the repairs of the boat, and the money will be worth more to me now than 60 days hence. If you will pay me to-day I will close it up, the whole claim, and give you a full discharge. Mr. Oakley replied that, as far as paying you to-day is concerned, I cannot speak for any companies except our own. We will pay you to-day, and have no doubt that the companies located in New York or having their headquarters in New York will do likewise. Wickham replied: Well, I will do it. A receipt was drawn up and signed and a check drawn to pay him, and Wickham said: How am I to get my money from the rest of the companies? Mr. Oakley replied: That the loss had been compromised, and with our signatures the companies will undoubtedly pay you. The certificate of January 19th was then drawn up by a clerk, and Mr. Oakley objected to it because it said nothing about a compromise, and ordered a new one to be written. When Mr. Wickham ascertained that it would take ten or fifteen minutes he said: The time is getting short. It is now after one o'clock, and I have to go to the rest of the companies and get my money; the banks close at three o'clock, and if I wait until that time I will lose my chance for getting the train to-night.

Mr. Oakley consented to sign the certificate as it was, and the papers were signed and the policy given up.

53 The defendant's evidence shows that Mr. Wickham took this certificate and went around to most of the companies that very day, showing his certificate, and got his money in accordance with the same, and at some of the offices stated very distinctly that the whole matter had been compromised and settled, but Wickham denied having made such admission. The said Wellman further testified that after the interview between S. D. Wickham and said committee had taken place Wickham came to his, Wellman's, office, and in the conversation which there occurred Wickham said, substantially: I am sorry that we have not got nearer to this thing than we have got, and I says, Yes, Mr. Wickham; I am sorry, too, but I trust you appreciate I am acting conscientiously in this affair, and, although I don't think I am liable for raising the vessel, I still say the doubt in my mind is so great that I could not admit it without its being settled in a court of law. Wickham replied what he had said repeatedly before: I don't mean to have a lawsuit; it is all settled now. After that there was some remark about raising the vessel, and I said when you know what your figures are come back; perhaps we will do something for you. I felt sorry for him.

Thirteenth.

Plaintiffs also offered evidence to prove that after Exhibit Q Q, viz., the certificate of January 19th, 1884, had been signed he was asked to surrender his policies under the following clause therein contained, viz: This insurance may be terminated at any time at the option of the company, on giving notice to that effect to the

54 insured, either verbally or by leaving such notice at his last-known place of residence or business. In such case the insured shall be entitled to claim a ratable proportion of the premium for the unexpired term for which the policy was to run, and that the surrender of said policies was made in compliance with such demand under said clause, in consideration of the payment to him of the unearned premiums.

The defendant offered evidence to show that the surrender of said policies was made as a part of the accord and satisfaction set forth in the plea filed in said cause.

Fourteenth.

When Wickham went to the office of the Continental Insurance Co., which had also a marine insurance, but not covering losses by fire, on said vessel to collect the amount apportioned against said company under the aforesaid adjustment he informed the agent of said company that the committee had refused to consider his claim for the expense of raising and saving the steamer; had ignored said expense entirely; that Mr. Nourse, the agent of the Continental Co., then said to him that, as far as the Continental Co. was concerned, it did not propose to treat the matter in that way, but was willing to pay something on that account for the purpose of having the

whole thing settled as against that company; that Wickham replied that, for the sake of such settlement, he would be willing to leave it to said Nourse to say how much the Continental should pay toward said claim; that subsequently said Nourse informed him he
55 had conferred with the president of said company, who had authorized him to pay said Wickham $100.00 in addition to the amount apportioned against said company under said adjustment, said $100.00 to be in compromise and satisfaction of the plaintiffs' claim against the Continental for raising and saving the steamer, and said Wickham then and there accepted the amount, saying that it was much less than what he expected the company would offer, but that he would take it because he had said he would leave it to the company to determine what the amount should be; which was paid to him, together with the amount apportioned to said company under said adjustment, and the following receipt to said company signed. Plaintiffs have made no further claim against said Continental Insurance Co.

Defendant objected to the evidence so offered by the plaintiffs.

$2,980.90. NEW YORK, *January 19th*, 1884.

Received of the Continental Insurance Company of the City of New York twenty-nine hundred and eighty $\frac{90}{100}$ dollars, less $——, deducted for discount for payment in advance of maturity, being in full satisfaction of all claims and demands upon said company for loss and damage by fire, including all expenses of raising and protecting and caring for said vessel, which occurred on the 10th and 24th days of November, 1883, to property consisting of propeller St. Paul, situate at Detroit, Mich., and at Detour, Mich., insured by said company by policy No. 29, renewal No. —, and the said company, in consideration thereof, is hereby discharged forever from all further claim by reason of said fire, loss, and damage, and
56 said policy of insurance is hereby assigned, with all claim thereunder, to said company, and said policy is hereby cancelled in full and surrendered to said company.

Witness — hand and seal.

(Signed) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
By JNO. W. WICKHAM, JR.

Witnessed by—
W. F. NOURSE, JR.

Claim ---------- $2,980 90
Int. ---------- $
$2,980 90

Fifteenth.

The amount thus paid to the plaintiffs was just the amount claimed under said proofs of loss, but it was about 55 days before

the same was due and payable, as by the terms of all the policies save one the amount of the loss was not payable until 60 days after the proofs of loss were furnished to the insurance companies, and this was not earlier than January 14, 1884. The court held, as will appear by the charge hereto annexed, that this prepayment before the amount became due was a good consideration for the settlement and discharge of the whole claim, if such settlement and discharge was actually made and if it was so understood and agreed by the parties.

Sixteenth.

There was no evidence that said agreement of January 19th, Exhibit Q Q, and the said several receipts and discharges executed by the plaintiffs, hereinbefore set forth, were obtained by any fraud or misrepresentation of the defendants or their agents.

57 Seventeenth.

The defendant claimed that the certificates of apportionment of January 19th, Exhibit Q Q, together with the receipts and drafts set forth, as a matter of law, show a full settlement of this entire claim and an accord and satisfaction thereof.

Eighteenth.

Plaintiffs claimed that the settlement related solely to the loss covered by the proofs of loss already mentioned, and was not intended to and did not embrace a claim for raising the vessel and cargo and saving the same.

Nineteenth.

The defendant claimed that the entire claim was settled, and that it was so understood by both parties.

Twentieth.

But the court divided upon the question whether such parol evidence was admissible, and, the presiding judge holding that it was admissible, it was admitted; and this question of what the parties intended by said settlement and accord and satisfaction was submitted to the jury, under the charge of the court hereto annexed, and upon such parol testimony and the papers set forth a verdict was rendered for the plaintiffs for the sum of $2,297.65, and judgment has been rendered accordingly.

Twenty-first.

The above record sets forth substantially all the evidence material to the issues herein mentioned.

58 Twenty-second.

The defendant requested the court to charge the jury that the defendants were entitled to a verdict. The court divided, and the

presiding judge being of the opinion that the request should not be given, it was not given. The cause was then argued by counsel for the respective parties.

Certificate of Division.

The questions upon which the court was divided in opinion are hereby stated by said judges, during the same term at which the trial took place, and at the request of the defendant.

The points of difference are as follows:

First.

On the facts stated in the foregoing record, Was the parol testimony offered in evidence by the plaintiffs admissible to vary and contradict the certificate of January 19th, Exhibit Q Q, and the receipts and drafts hereinbefore set forth?

Second.

Was the defendant entitled to a verdict under the facts in said record hereinbefore set forth?

The presiding judge was of the opinion:

First.

That the parol testimony hereinbefore referred to was admissible.

59 Second.

That the defendant was not entitled to a verdict against the plaintiffs on the evidence in court and set forth in the record.

And said district judge certifies that in each of these opinions he differed from the presiding judge, and therefore this certificate of division of opinion is prepared at the request of the defendant, and signed by said judges, and directed to be entered of record.

HOWELL E. JACKSON,
Circuit Judge.
HENRY B. BROWN,
District Judge.

60 The district judge charged the jury as follows:

GENTLEMEN OF THE JURY: This is a suit to recover the necessary expenses incurred in sinking and raising the propeller St. Paul at Detour and Detroit and taking her to Detroit for repairs. The defence is that the claim was included and compromised in a settlement made with the insurance companies at New York on the 19th day of January, 1884. To establish this defence, as it appears that the amount paid was less than the plaintiff's entire claim, the jury must be satisfied that such compromise was fairly agreed upon between the parties to that settlement, including the claim now sued upon, and that such agreement was based upon sufficient consideration and accepted as such by the plaintiff.

The decisive question in the case is, Did the plaintiff and defendant, in making the settlement, mutually agree to compromise and settle all claims of the plaintiff against the defendant under this policy of insurance, including the claim for expenses in sinking and raising the St. Paul as aforesaid and taking her to a port of repair? If they did so agree, and there was a consideration for such agreement, the defence is sustained and the defendant is entitled to your verdict; if not so, the defence fails and the plaintiff is entitled to recover.

There are a good many facts in this case about which there can be no dispute. In the first place, there is no doubt that the St. Paul took fire on or about the 10th of November up at Detour, which is where St. Mary's river enters into Lake Huron; that, finding the fire was beyond their control, the vessel was scuttled and
61 sunk and the fire was extinguished in the course of a day or so after it began; that a tug with wrecking apparatus was then engaged to raise the vessel and bring her down to Detroit; that she was raised and brought down here, and that on the 24th of November, some two weeks after the first fire, a second fire broke out while she was lying here, and caused further damage to the vessel. The question in this case is whether the plaintiff is entitled to recover any additional damage to that done directly by the fire, which was paid in consequence of raising this vessel and bringing her down to Detroit; and I charge you in this connection that under the policies of insurance the fire insurance companies became liable to pay and make good to the plaintiffs any damages caused to the propeller on account of the fire, not exceeding the amount insured, including the cost of repairs and restoring the vessel to the condition in which she was before the fire, and also the expense and labor to which the plaintiffs were necessarily subjected in caring and saving the property on account of the loss by the fires; and if it became necessary to scuttle and sink the vessel to prevent her being further injured or being destroyed by fire, and to raise her and bring her from Detour to Detroit to make repairs, and that it was necessary in Detroit to unload and repair her, that while she was again unladen and sunk there in the river the plaintiffs would be entitled not only to recover these expenses, but also the necessary expenses they have been subjected to in raising the vessel in Detour and in raising her after she
62 was sunk here. Something was said upon the argument in regard to the possible exemption of the company from liability on account of the lime and acids which caused the fire, but there is no evidence here that the propeller, when burned, was carrying any goods or merchandise the carrying of which is prohibited by law, and I charge you the insurers were not exempt from liability for any part of the loss, even if lime and acids did occasion the fire.

After the second loss occurred the plaintiffs proceeded to make proofs of loss, to estimate their damages, and to tender the formal proofs as to their claim against the insurance companies, and on the 15th day of December, 1883, there was an agreement executed between Wickham, one of the plaintiffs and the general manager

of the vessel, and Mr. Murray, representing the Continental and another insurance company, and Mr. Allen, representing a large number of other insurance companies, and also representing the defendant in this case, to the effect that Morris and Parsons should estimate at the true cash value all loss and damage occasioned to the St. Paul by these fires. This instrument was executed at Detroit on the 15th day of December, and is signed first by Wickham himself, and after his signature appears, I believe, in the handwriting of Mr. Murray, and I think that is not disputed, the further clause: And this agreement does not apply to or cover any question that may arise for saving the boat and cargo. In that connection we see the first dispute that arose in connection with these losses, and I don't know, gentlemen, that it is material how these words became inserted in this agreement to arbitrate the amount of dam-
63 ages, because it does appear that they estimated the loss and damage, which was nothing less than the amount of loss to the propeller by reason of these fires, and that this estimation included the damage done to the tackle, apparel, and furniture to the amount of some $15,364.78, the representatives of the company denying their liability for the cost of raising and bringing the vessel down to Detroit.

The next documentary evidence is a letter signed by Allen, the adjuster, *who* on the 12th day of January, 1884—which letter is seemingly addressed to the companies—in which he says: I enclose herewith proofs of John W. Wickham, managing owner, for loss and damage to the propeller St. Paul, which I trust will be found satisfactory. The claim as made covers the entire loss and damage by fire and water, as per agreement. The assured will make a further claim for the expenses of raising the propeller, and is now preparing a statement of such expense to submit with his subsequent claim. This indicates pretty clearly that Allen, the adjuster of the company, was apprised that the plaintiff was about to make this claim, and if you find these statements went on with the proofs of loss to New York, it would certainly indicate that the defendant was apprised that the plaintiff intended to make a claim for the expense of raising and bringing the propeller to Detroit.

On or about the 18th of January the plaintiff went to New York, and endeavored to effect a settlement of his claim. His statement is that he demanded the amount of the survey as shown by
64 the adjustment, and that he offered to settle his other claim for the expense of raising and saving the vessel—the wrecking expenses, as I will call it—for $5,000, saying they would amount to about $10,000, as he thought; that he was willing, upon his own showing, to compromise that part of the claim for $5,000.00 and defendant's claim for considerable less.

Now, gentlemen, with regard to that expense, I charge you, as I have already charged you, that it was a legitimate liability on the part of the insurance companies. At the same time it was a liability of a somewhat unusual description for a fire insurance company to be called upon to pay, and to an unlearned mind I think it might be a fair question whether the company should be bound by it. In

other words, I can conceive that there may be room for a fair difference of opinion between persons unlearned in law as to the liability of fire companies for these losses. I think that a lawyer well read in insurance law would pronounce without much doubt that the company would be liable, and that, as I understand, is not contested in this case, and probably well-informed insurance agents would entertain the same opinion. At the same time, as I said before, the claim is not a claim for direct loss by fire, and I can conceive it would be a fair subject for compromise and dispute, and that persons unlearned in law might entertain different views with regard to the liability of the companies to pay the loss, and hence it was, as it seems to me, a fair question for discussion and compromise.

65 From the time the plaintiff Wickham arrived in New York the conflict in testimony begins. It seems that a settlement was effected and certain receipts were passed, and I charge you in this connection that the memorandum of adjustment signed by the plaintiff under date of January 19th, the receipts which he executed to defendants on the same date, together with the cancellation of the policies upon which plaintiffs' claim is based, are *prima facie* a full discharge of defendants from all claims of the plaintiffs under these policies; that the papers upon their face tend to prove a full accord and satisfaction of plaintiffs against these defendants for this loss. The plaintiffs then have no right to recover under this policy unless *he* proves either that this claim was not intended to be included in these receipts and in the settlement or that there was no consideration for the release of this claim, and in such case the burden of proof is upon the plaintiffs, and they must show these facts by a preponderance of testimony. I charge you, further, that there is no evidence tending to prove any fraud on the part of the defendants in obtaining the receipts and the cancellation of the policy. The question in the case is, and I repeat it in this point of my charge, Did these parties compromise and settle, understanding they were compromising and settling the plaintiffs' entire claim against these insurance companies? If such was the understanding between the parties and there was a consideration for it, of which I shall have something to say hereafter, for the release of this claim it is a perfect defense to this suit. If, on the other hand, you find that

66 this was intended only as a payment of the plaintiff's claim for the direct loss occasioned by the fires, and that he reserved or intended to reserve this right to prosecute this claim for the recovery of the wrecking expenses, then the plaintiff is entiled to recover.

It seems that after the plaintiff had reached New York there was a meeting called of the agents of these various companies, at the rooms of the board of underwriters in New York, at which was represented the Continental Insurance Company; the Fire Insurance Association, the defendant in this suit; the Queen's, the Exchange, the Mechanics', the Greenwich, and others, amounting in all to $26,500. Mr. Wellman was appointed chairman of the meeting. A communication from Murray, the adjuster, at Detroit, was

read in relation to the expense of raising the St. Paul. A memorandum was made by Mr. Wellman to the following effect:

JANUARY 18TH, 1884.

Meetings of the companies interested in the loss of the propeller St. Paul. Organized by Wellman, as chairman. Communication from John W. Murray, adjuster, at Detroit, in relation to the expense incurred in raising and saving the St. Paul.

At this point some one else seems to have taken the pencil in his hand and made this further memorandum:

On motion, duly seconded, that the request of the assured to help him out is not granted, but the companies are recommended to pay the amount of claims set forth in the proofs of loss. Carried. Meeting adjourned.

G. W. MONTGOMERY.

Upon the bottom of this paper is a further memorandum,:

67 On motion, the action of the meeting be referred to a committee of two for the purpose of conferring with the owner. Carried. Chair appointed Oakley and Wellman.

Those present at the meeting say that Mr. Oakley declined to serve upon the committee unless he was given full power to settle the entire claim against the companies.

Now, as I said before, I think the claims of the plaintiffs against these companies were fair subjects for discussion and compromise, and, if you find the entire claim of the plaintiff was compromised upon a sufficient consideration, then your verdict should be for the defendant, and it makes no difference what your opinion may be in regard to the nature of the compromise, whether it was favorable or unfavorable to the plaintiff; that can only be considered by you in considering the probability of the compromise having been made. The law favors settlements of controversies. It favors full accord and satisfaction, and if men without fraud and misrepresentation—and none such is claimed in this case—enter into a settlement of their difficulties, it is a bar to any litigation, and, where men occupy any fiduciary relation one to the other, each one is bound to look out for his own rights. The law protects those who protect themselves; and, if you find that the plaintiff intended to compromise his claim against these companies, then, as I said before, it makes no difference that, in your opinion, he compromised his claim for half the amount that was due him, or that the compromise was such an one as you would have made; but if you find the
68 bargain was actually made and for a sufficient consideration, that is the end of this case, and your verdict should be for the defendant. It was not the duty of the insurance companies to apprise the plaintiff in regard to the legality of his claim. The personal relation of the parties was not calculated to beget confidence and reliance, but the contrary. There are cases where one party dealing with another is bound to apprise the party of his rights.

For instance, where a guardian deals with his ward he is bound to exercise the utmost good faith and apprise him of all the legal consequences of his acts. The relation of an attorney carrying on dealings with his client imposes the utmost good faith, and he is bound to let him understand perfectly the terms upon which they deal and to apprise him of his legal rights; but there was no such obligation between Wickham and these companies; and if you find that these companies represented to Wickham that he had no legal claims against them they would, nevertheless, not be liable for a misrepresentation, because it was a misrepresentation as to a legal fact, and plaintiff was as much bound to take notice of the law as the defendants. If the misrepresentation was a mere matter of opinion as to the rights of these parties—that is, in this case, as to their being under any liability for these services—those representations, though acted upon by the plaintiff, would not vitiate this settlement. This is always the case where parties are mutually cognizant of the facts acted upon and there exists no fiduciary relation between
69 them. In such a case the law will not aid the party to protect himself against a lax exercise of his good sense as to his legal rights.

On the 19th of January, and following this meeting, there is no doubt they came to an arrangement by which defendants paid the appraised amount of this loss—that is, the amount of the survey—and the following memoranda was executed:

This is to certify that the loss and damage by fire which occurred on the 23rd of November, 1883, to the steamer St. Paul is this day adjusted at the sum of $15,364.78, payable without discount upon presentation of the policies to the several companies interested, and is apportioned among the said companies as follows, here giving the various amounts. These various amounts were paid on the receipts to which I shall call your attention, that were executed. Was this settlement intended as a settlement of the plaintiff's entire claim against the defendants? So far as the oral testimony is concerned, we have the testimony of Wickham on the one hand, of Wellman, Oakley, Halsey, Seamon, Wastell, Nourse, and Montgomery upon the other. The testimony of all these witnesses tends to show that the settlement was of the entire claim of the plaintiff against these companies.

So far as the question of consideration is concerned, if you shall find that the sum of fifteen thousand — odd dollars was in settlement of this entire controversy between these parties, the consideration is sufficient to support this settlement; and I further charge charge you that by the terms of the policies the defendants
70 were not obliged to pay the loss by fire upon the property insured until the 60 days had elapsed provided for in the proofs of loss. The amount claimed by virtue of the policy in this case was not, therefore, due until 60 days after the proofs of loss were served upon the companies at their offices. The payment of the policy 55 days in advance of the time when the same would become due, without discount for interest, was of itself a sufficient consideration for waiving the plaintiff's further claim under the policies,

if it was understood as such. This prepayment of 55 days to be a sufficient consideration for the release of the plaintiff's claim for the wrecking expenses must have been understood between the parties to be such, and this prepayment is a sufficient consideration to support the settlement by which the $15,000 was paid in full, if it was understood as such.

In this connection I wish to call your attention to the receipts that were given. These receipts are very sweeping in their character, and are *prima facie* evidence of the facts stated in them. The plaintiff Wickham says that he did not read the language or contents of these receipts. I charge you in that connection he was bound to read or inform himself of the contents of the receipts before he signed them, and his signature is *prima facie* evidence that he was apprised of their contents. There is no pretence here that they were misread or that he was imposed upon in any way in signing these receipts. Under such circumstances the law presumes that before he signed them he apprised himself of their contents. I will
71 call your attention to the language of some of these receipts without reading them all. I read from the receipt given to the Queen's Insurance Company: Received of the Queen's Insurance Company of Liverpool, through McDonald, as manager, as per compromise settlement for all loss and damage by fire which occurred on the 11th of November, and in consideration of said payment the said policy is hereby cancelled and surrendered. Upon executing this receipt he received a draft as follows: Pay to the order of John W. Wickham, manager, and W. B. Comstock $2,600, being in full of all claim and demands against this company, as per compromise settlement, for loss and damage by fire. The following receipt was given to the Security Insurance Co. of New Haven: Being in full satisfaction and settlement of all claims and demands for loss and damage by fire which occurred on the 10th and 24th of November to the property insured by the policy, &c., and in consideration of such payment this policy is cancelled and surrendered to this company.

The following receipt is given to the Liverpool, London & Globe in full compromise and payment of all demands to said company by loss and damage by fire.

(The court also read the receipt of the Greenwich Insurance company.)

COURT: The receipt given to the Fire Insurance Association, the defendant in this case, is as follows: Received of the Fire Insurance Association of London, England, $1,344, being in full of all claims and demands for loss and damage by fire which occurred on the 10th and 24th of November, etc., and in consideration of said
72 payment said policy is hereby cancelled and surrendered to said company, and all further claims by virtue of said policy are forever waived.

The receipt given to the Continental Company was in somewhat different form. I have not the receipt before me, but it particularly specified the wrecking expenses, for which an additional consideration of $100, as I recollect, was paid.

Now, gentlemen, it is for you to say, notwithstanding these receipts, whether the plaintiff did intend to surrender and cancel this claim; whether the settlement was intended as a settlement of his claim for wrecking expenses connected with this loss. On the one hand it is said, with a good deal of force, that the plaintiff, having a claim against these companies, agreed to settle his claim for fifty cents on the dollar. On the other hand it is said that it is improbable that an insurance company would consent to pay his loss immediately and without waiting until the 60 days had expired. On the part of the plaintiff it is claimed that, having a valid claim against these companies, he would not have consented to settle such claim for what is practically fifty cents on the dollar. I correct what I said on that subject before. On the other hand it is said it is impossible that an insurance company would consent to settle his loss immediately without waiting for the 60 days to expire. I can conceive, however, that the company may desire to befriend a good customer by anticipating the payment and paying be-
73 fore the expiration of the time fixed. I can readily conceive that the owner of a vessel, being short of funds and being desirous of repairing his steamer and getting her ready at the opening of navigation, would make a large discount of his claim for the purpose of getting his money on the spot to make those repairs. Neither of these possibilities seem to me to be so remote as to be incredible. At the same time, it is for you to give such weight to them as in your judgment you see fit.

I have another word to say as to the surrender of these policies. The surrender of these policies is evidence, and pretty strong evidence, it seems to me, of the intention of the plaintiff to relinquish his entire claim, and yet it is not sufficient of itself to defeat his right of recovery. If you find the policies were surrendered in consideration of the unearned premiums stated on the receipt of the policy, then the defense of a surrender is no defense in the suit, and while the surrender has a tendency to show his relinquishment of all rights under the policy, still it is not conclusive evidence if you find, as you are at liberty to do, that the surrender was made in consideration of the unearned premium; then, so far as this question is concerned, the plaintiff would be entitle to recover. It is for you to say whether this settlement was intended by both parties to be in full of all plaintiff's claims against the company, or whether it was intended by the plaintiff merely to be a settlement of the loss by fire, and that the plaintiff intended to reserve his right of action against the company for wrecking expenses.

74 Gentlemen of the jury, this has been a long and expensive trial, and it is very desirable that you should agree upon a verdict. A disagreement of a jury is often a defeat, and always a miscarriage, of justice. Very few cases submitted to a jury are clear to an absolute certainty. All that the law requires in civil cases is that the jury shall determine upon which side lies the preponderance of testimony. In reaching a result it is natural and probable that differences of opinion will arise in regard to the bearing of certain facts and the weight to be given to the testimony of particular witnesses.

It is your duty to reconcile these differences, if it is possible to do so without yielding your own well-settled convictions as to what the result should be. It is true that the parties are entitled to the opinion of each individual juror, yet that does not imply that first impressions may not be changed by a conference in the jury-room. It is your duty to listen with deference to each other's arguments, with a disposition to be convinced if you are wrong. Especially, you ought to beware of dissenting from a majority of your fellow-jurymen out of mere obstinacy or pride of opinion. Bear in mind that the case, if retried, will be tried before twelve men no more intelligent and impartial than yourselves; that they will meet the same difficulties you have encountered and they are no more liable to agree than you, and that your verdict will put a speedy end to this litigation. It is your duty to obviate the necessity of another trial if you can conscientiously do so. If you find for the plaintiff you will find for $2,297.55, and if you find for defendant
75 your verdict should be generally for defendant.

Gentlemen of the jury, the case is in your hands. You will retire in charge of an officer to consider your verdict.

76 EXHIBIT A.

Agreement for Submission to Appraisers.

It is hereby agreed by John W. Wickham, Jr., managing owner, and W. B. Comstock, of the first part, and the several insurance companies named in the annexed list, of the second part, that William Morris and Sam'l V. Parsons (together with a third person to be appointed by them, if necessary) shall appraise and estimate, at the true cash value, the loss and damage by fire to the property belonging to the said John W. Wickham, Jr., managing owner, and W. B. Comstock, as specified herein, which appraisement or estimate by them or any two of them, in writing, as to the amount of such loss or damage, shall be binding on both parties, it being understood that this appointment is without reference to any other question or matter of difference within the terms and condition of the insurance, and is of binding effect only as far as regards the actual cash value of or damage to such property covered by policies of said companies issued at their various agencies.

The property on which loss or damage is to be estimated and appraised is the hull of the propeller St. Paul, including the tackle, awnings, apparel, furniture, engine, and boiler connections and appurtenances thereto belonging.

And it is expressly understood and agreed that the said appraisers are to take into consideration the age, condition, and location of said premises previous to the fire, and also the value of the walls, materials, or any portion of said boat saved. Said appraisers are
77 hereby directed to prepare their award of said loss or damage in the form of a detailed itemized statement, in accordance with above agreement, and make return of same to said companies.

Witness our hands, at Detroit, this 15th day of December, 1883.

(Signed) JOHN W. WICKHAM,
Managing Owner.

And this agreement does not apply to or cover any question that may arise for saving boat and cargo.

(Signed) CONTINENTAL INS. CO., N. Y.,
JNO. F. MURRAY.
MECHANICS' FIRE INS. CO., BROOKLYN,
JNO. F. MURRAY.
LIVERPOOL AND LONDON AND GLOBE SECURITY INS. CO., N. HAVEN.
FIRE INSURANCE ASSOCIATION,
QUEEN FIRE INS. CO.,
GREENWICH INS. CO.,
GERMAN FIRE INS. CO., PITTSBURGH,
W. D. ALLEN, *Adjuster.*
PRESCOTT INS. CO.,
EXCHANGE INS. CO.,
JN. F. MURRAY.

78 Circuit Court of the United States for the Eastern District of Michigan.

John W. Wickham, Jr., who is a citizen of the State of Ohio, and William B. Comstock, who is a citizen of the State of Michigan, for the use of John W. Wickham, Jr., plaintiffs in this suit, by Moore and Canfield, their attorneys, complain of the Fire Insurance Association, Limited, a corporation organized and existing under the laws of the Kingdom of Great Britain, and which is an alien, being a citizen of said Kingdom, and doing business in the State of Michigan as a foreign insurance company under and by virtue of the statutes of the State of Michigan, having an agent duly appointed to acknowledge service of process for and on behalf of said company residing in said State and in the eastern district thereof, in a plea of trespass on the case upon promises, filing this declaration as commencement of suit, for that whereas the said defendant heretofore, to wit, on the 1st day of April, 1883, made, executed, and delivered to the plaintiffs a certain policy of insurance, bearing date the day and year aforesaid, whereby the said defendant, in consideration of the sum of thirty-five dollars to it paid by said plaintiffs, the said defendant did insure the said plaintiffs to the amount of thirty-five hundred dollars on the hull of the propeller St. Paul, together with and including the tackle, awnings, apparel, furniture, boilers, and machinery in connection and appurtenances on board or attached to said propeller, from noon of the 1st day of April, 1883, to noon of the 1st day of April, 1884, against all such immediate loss or

79 damage sustained by said assured and their representatives as might occur by fire to the property specified, loss, if any, payable to said John W. Wickham, Jr., managing owner.

And the plaintiffs aver that afterwards and while the said policy was in full force and while said propeller was proceeding on a voyage from the port of Buffalo, in the State of New York, to the port of Duluth, in the State of Minnesota, and intermediate ports, and when near Detour, to wit, on or about the 10th day of November, 1883, said propeller accidentally took fire and was thereby greatly injured and damaged; that, to prevent the loss and destruction of said propeller, plaintiffs, at great cost and expense, employed divers pumps, steam-tugs, and men to extinguish said fire, and that it was impossible thus to save the said propeller. Her officers and crew caused her to be scuttled, whereby she was filled with water and sunk; that as soon thereafter as possible the said plaintiffs, at great cost and expense, caused the said propeller to be raised and brought to Detroit for the purpose of necessary repairs.

That soon after her arrival at Detroit aforesaid and while lying at Detroit a fire again broke out on said propeller, which threatened wholly to consume and destroy her, and that for the purpose of preserving her from destruction she was again scuttled and sunk in the Detroit river, and by reason of such scuttling and sinking said fire was extinguished.

That thereupon the said plaintiffs, at great cost and expense, again caused said propeller to be raised and placed in the dry-dock
80 at Detroit for the purpose of repairing the injuries to her hull, furniture, and apparel, as well as to her boilers, engines, and machinery and other property injured by said fire and embraced in said policy of insurance.

The plaintiffs further aver that the damage and loss by them suffered on account of said fire, other than the costs and expenses by them incurred in attempting to extinguish said fire as aforesaid and in raising and rescuing said propeller as aforesaid, amounted to a large sum, to wit, the sum of twenty thousand dollars.

That the necessary costs and expenses of raising and rescuing said propeller as aforesaid was also a large sum, to wit, the sum of twenty thousand dollars, which sums were necessarily paid and expended by plaintiffs for the purpose aforesaid, and that by reason of said fire these plaintiffs suffered loss and damage in a large sum, to wit, the sum of forty thousand dollars, of which said defendants had notice; that proofs of loss under said policy were furnished to said defendant, and that the time limited for the payment of said loss had elapsed, and that by reason of the premises the said defendant became liable to pay the plaintiffs the amount insured by virtue of said policy, to wit, the sum of thirty-five hundred dollars, and that, being so liable, the said defendant afterwards, to wit, on the 1st day of November, 1884, to wit, at Detroit, in said district, in consideration of the premises, promised the plaintiffs to pay them the aforesaid sum of thirty-five hundred dollars when it, the said defendant, should be thereunto afterwards requested, yet the said defendant, although often requested so to do, have not paid the

said plaintiffs the said sum of thirty-five hundred dollars
81 or any part thereof.

For that whereas also the said defendant heretofore, to wit, on the first day of April, 1883, in consideration of the sum of fifteen dollars to it in hand paid the plaintiffs as premium therefor, did make, execute, and deliver to the plaintiffs a certain other policy of insurance, whereby the said defendant did insure the plaintiffs to the amount of fifteen hundred dollars on the hull of the propeller St. Paul, which was then and now is the property of the plaintiffs, together with and including the tackle, awnings, apparel, furniture, engines, boilers, and machinery in connection and appurtenances thereunto belonging, in board or attached to said propeller, from noon of the 1st day of April, 1883, to noon of the 1st day of April, 1884, against all such immediate loss or damage sustained by the plaintiffs and their legal representatives as might occur by fire to property specified not exceeding the sum insured as aforesaid nor the interest of the assured in the propeller.

And the plaintiffs aver that afterwards, to wit, on or about the 10th day of November, 1883, while said propeller was on a voyage from the port of Buffalo to the port of Duluth, and when near Detour, in the State of Michigan, she accidentally took fire and was thereby greatly injured and damaged; that to extinguish said fire and prevent the loss and destruction of said propeller plaintiffs, at great cost and expense, employed divers pumps, steam-tugs, and men to assist said propeller; and, being unable to save said propeller by these means, it became necessary then and there to
82 scuttle and sink her, which was accordingly done by her officers and crew, and that thereby the said fire was extinguished.

That as soon thereafter as possible the said plaintiffs, for the purpose of saving said propeller, caused her to be raised and brought to the port of Detroit, where she arrived about the 23rd day of November, 1883; that soon after her arrival at Detroit as aforesaid, to wit, on or about the 23rd day of November, 1883, fire again broke out on said propeller, to extinguish which it became necessary again to scuttle and sink her in the Detroit river, at Detroit aforesaid, and thereby said fire was again extinguished.

That soon thereafter said plaintiffs, at great cost and expense, caused said propeller again to be raised and taken into a dry-dock at Detroit for repairs; that the costs and expenses incurred by plaintiffs in the hire of said pumps and steam-tugs and men as aforesaid, together with the cost and expense of raising said propeller and bringing her to Detroit as aforesaid, and again raising her at Detroit and taking her to the dry-dock for repairs, was a large sum, to wit, the sum of twenty thousand dollars.

That the cost and expense of repairing said propeller and replacing the property covered by said policy which was injured and destroyed by said fire was a large sum, to wit, the sum of twenty thousand dollars.

And that by reason of said fire the plaintiffs therefore suffered damage in a large sum, to wit, the sum of forty thousand dollars, of

which the said defendant had notice; that the time of the payment of said loss and damage by said defendant under said policy
83 has elapsed, and that by reason of the premises the said defendant became liable to pay to the plaintiffs the said sum of fifteen hundred dollars insured for by its said policy; and, being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the first day of November, 1884, to wit, at Detroit, in said district, promised the plaintiffs to pay them the said sum of fifteen hundred dollars when it, the said defendant, should be thereunto requested, yet the said defendant, although requested so to do, has not paid the said sum or any part thereof.

Whereas, also, the said defendant heretofore, to wit, on the first day of April, 1883, did make and deliver to the plaintiffs a certain other policy of insurance on the hull of the propeller St. Paul, together with and including the tackle, awnings, apparel, furniture, engines and boilers, machinery in connection and appurtenances then thereunto belonging, in board or attached to said propeller, which was then and now is the property of said plaintiffs, and by said policy and in consideration of the premium of fifteen dollars to it paid the said defendant did insure the plaintiffs against all such immediate loss or damage sustained by the plaintiffs and their legal representatives as might occur by fire to the property specified, which said policy the said defendant, in consideration of the further sum of fifteen hundred dollars to it paid by the plaintiffs, was, on the first day of April, 1883, renewed and extended for the further period of one year, by which renewal and policy the defendant, for the consideration aforesaid, did insure the property above
84 specified against all such immediate loss or damage by fire sustained by plaintiffs or their legal representatives as might occur by fire, from noon of the first day of April, 1883, to noon of the first day of April, 1884.

And the plaintiffs aver that while said policy was in full force and while said propeller was on a voyage from Buffalo to the port of Duluth and when near Detour, in the State of Michigan, to wit, on or about the 10th day of November, 1883, the said propeller took fire, and to prevent her destruction by reason of said fire it became necessary for plaintiffs to employ divers pumps, steam-tugs, and men, and finally to scuttle and sink her, to wit, at Detour aforesaid.

That after the fire had been thus extinguished the plaintiffs, for the purpose of preserving and saving said propeller, at great cost and expense, caused her to be raised and brought to the port of Detroit for repairs made necessary by said fire.

That upon her arrival at Detroit aforesaid, and while said propeller was lying in the Detroit river, she again took fire, and it became necessary again for her officers and crew to scuttle and sink her; that when the fire was extinguished, by reason of such scuttling and sinking, the plaintiffs, at great cost and expense, for the purpose of saving said propeller, caused her again to be raised and taken to the dry-dock at the port of Detroit for necessary repairs; that the costs and expenses to which said plaintiffs were necessarily subjected in raising and rescuing said propeller, bringing her to

Detroit, again rescuing her and taking her to the dry-docks
85 aforesaid, amounted in all to a large sum, to wit, the sum of fifteen thousand three hundred and sixty-four dollars and seventy-eight cents, $15,364.78, and by reason of the premises the said defendant became liable to pay, under and by virtue of its said last-named policy, the sum of five hundred and seventy-six dollars and eighteen cents, that being the amount due from said defendant in the proportion which the sum insured by its said policy bears to the value of the property insured, all of which the said defendant had notice.

Whereas also the said defendant heretofore, to wit, on the first day of April, 1883, did make and deliver to the plaintiffs a certain other policy of insurance on the hull of the propeller St. Paul, together with and including the tackle, awnings, apparel, furniture, engines, and boilers, machinery in connection and appurtenances thereunto belonging, in board or attached to said propeller, which was then and now is the property of the said plaintiffs, and by said policy and in consideration of the premium of thirty-five dollars to it paid, the said defendant did insure the plaintiffs against all such immediate loss or damage sustained by the plaintiffs and their legal representatives as might occur by fire to the property specified, which said policy — from noon on the first day of April, 1883, to noon of the first day of April, 1884.

And the plaintiffs aver that while said policy was in full force and while said propeller was on a voyage from Buffalo to the port of Duluth and when near Detour, in the State of Michigan,
86 to wit, on or about the 10th day of November, 1883, the said propeller took fire, and to prevent her destruction by reason of said fire it became necessary for the plaintiffs to employ divers pumps, steam-tugs and men, and finally to scuttle and sink her, to wit, at Detour aforesaid.

That after the fire had been thus extinguished the plaintiffs, for the purpose of preserving and saving said propeller, at great cost and expense, caused her to be raised and brought to the port of Detroit for repairs made necessary by said fire.

That upon her arrival at Detroit aforesaid, and while said propeller was lying in the Detroit river, she again took fire, and it became necessary again for her officers and crew to scuttle and sink her; that when the fire was extinguished, by reason of such scuttling and sinking, the plaintiffs, at great cost and expense, for the purpose of saving said propeller, caused her again to be raised and taken to the dry-dock at the port of Detroit for necessary repairs; that the costs and expenses to which said plaintiffs were necessarily subjected in raising and rescuing said propeller, bringing her to Detroit, and again rescuing her and taking her to the dry-docks aforesaid amounted in all to a large sum, to wit, the sum of fifteen thousand three hundred and sixty-four dollars and seventy-eight cents ($15,364.78), and by reason of the premises the said defendant became liable to pay, under and by virtue of its said policy, the sum of thirteen hundred and forty-four dollars and forty-two cents ($1,344.42), that being the amount due from said defend-

ant in the proportion which the sum insured by its said
87 policy bears to the value of the property insured, of all which the said defendant had notice.

Plaintiffs further aver that the time fixed for the payment of said sum of money has long since elapsed, and that the defendant, in consideration of the premises, became liable to pay to the plaintiffs the aforesaid several sums of money; — afterwards, to wit, on the first day of November, 1884, to wit, at Detroit, in said district, promised the plaintiffs to pay them the said several sums of money hereinbefore mentioned, when it, the said defendant, should be thereunto afterwards requested; yet the said defendant, although often requested so to do, has not paid to the plaintiffs the said sums of money or any part thereof, to the damage of the plaintiffs in the sum of ten thousand dollars ($10,000), and therefore they bring suit.

MOORE & CANFIELD,
Plaintiffs' Att'ys.

88 The Circuit Court of the United States for the Eastern District of Michigan.

JOHN W. WICKHAM, JR., and WILLIAM B. COMSTOCK, Plaintiffs,

vs.

FIRE INSURANCE ASSOCIATION OF LONDON, Limited, Defendant.

The said defendant, The Fire Insurance Association, Limited, of London, by Blodgett & Patchin, its attorneys, comes and demands a trial of the matters set forth in plaintiffs' declaration.

BLODGETT & PATCHIN,
Defendant's Attorneys.

Please take notice that the said defendant will on the trial of this cause insist upon and give in evidence, under the above plea of general issue, that at the time of the losses and damages by the fires alleged in plaintiffs' declaration there were other valid policies, both fire and marine, in several other insurance companies upon the same property concurrent with this defendant's contracts of fire insurance, all of which were valid and subsisting insurance contracts, and each liable to contribute in such proportion as was therein stipulated to the payment of any and all such losses as the plaintiffs have in their declaration averred to have occurred.

And that after said losses by fire, and after said plaintiffs had made claim in writing by preliminary proofs thereof, one of
89 said plaintiffs, the said John W. Wickham, Jr., and who was one of the parties to whom the said contracts of insurance in plaintiffs' declaration mentioned was issued, visited the office of the defendant in the city of New York, and then and there had an interview with an authorized agent or manager of said defendant corporation for the purpose of negotiating a settlement of the claims for losses under said policies, which said plaintiffs before that time had made against said defendant, but the amount of which

claims and the liability of said defendant therefor, as well as the right of the defendant to contribute only its ratio with the other insurance companies having risks on the damaged property was disputed, and said parties not agreeing, continued their efforts for compromise and settlement to avoid litigation; and afterwards and after the time of said several losses or damages alleged in plaintiffs' declaration, after disagreement of said parties as aforesaid and before commencement of this suit, to wit, on the nineteenth day of January, in the year one thousand eight hundred and eighty-four, at the city of New York, to wit, at the city of Detroit, in the eastern district of Michigan aforesaid, the said defendant bargained with said plaintiffs and then and there paid to said plaintiffs a valuable consideration, to wit, the sum of one thousand nine hundred and twenty dollars and sixty cents, $1,920.60, in full accord and satisfaction and payment of all claims and demands upon said defendant for losses and damages by fire, at the several times in said plaintiffs' declaration set forth, to the property covered by said
90 defendant's fire insurance policies issued to plaintiffs by said defendants and bearing date one the first day of April, A. D. eighteen hundred and eighty-three, and the other the twentieth day of April, A. D. eighteen hundred and eighty-three, and which policies were numbered 180,617 and 181,252, as averred in plaintiffs, declaration; and which valuable consideration or sum of money so paid as aforesaid was then and there accepted and received by said plaintiffs of and from said defendant in full payment, satisfaction, release, and discharge of the said two (2) policies of insurance, and all losses, damages, and expenses in said declaration mentioned and growing out of said contracts of insurance; and for and in consideration of said money so paid and received as aforesaid said plaintiffs then and there released in writing the said defendant from all and every liability, obligation, or indebtedness growing out of all losses, expenses, and damages to the property covered by said policies or either of them by reason of either of said fires, and then and there the said plaintiffs cancelled, receipted in full, and surrendered each of said policies to said defendant, then and there agreeing that the payment and acceptance of the aforesaid sum of money was in full accord and satisfaction and discharge of any and all liabilities of said defendant to said plaintiffs, and that the same was a compromise settlement and discharge in full for all of the said causes of action set out in plaintiff's declaration.

And afterwards, to wit, at the time and place aforesaid, the
91 said plaintiffs received from the defendant a further valuable consideration, the same being the unearned premiums of the said insurance policies, and in consideration thereof the said plaintiffs released and discharged said defendant from any future contingent liability under each of said policies, and then and there the said policies were each cancelled by said plaintiffs and surrendered to the defendant as aforesaid, receipted, as a compromise settlement in full by mutual agreement between said parties.

And said plaintiffs will further take notice that the said defendant will insist and prove on the trial of this cause that each of said

policies in the plaintiffs' declaration mentioned contained a condition therein which was a part thereof and binding as a contract upon said plaintiffs, which condition is of the following effect:

It is furthermore expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

92 & 93 And defendant further avers and will insist and prove upon the trial of said cause that the several causes of action which are alleged in plaintiffs' declaration to have occurred and which did occur on the 10th day of November, A. D. 1883, and which plaintiffs claim for loss and damage, as averred, occurred more than twelve months prior to the commencement of this suit, and that any claim for loss or damage by said fire which occurred, as alleged in plaintiffs' declaration, on the tenth day of November, A. D. 1883, as aforesaid, is barred by the aforesaid condition of limitation in each of said policies, and that said plaintiffs are by the aforesaid condition of limitation of time for bringing suit estopped from proving or insisting upon any claim for loss or damage by fire, or growing out of fire, under either of said policies, on the tenth day of November last aforesaid, as this suit was — commenced until on or after the twelfth day of November, A. D. 1884, more than twelve months after the date or time of said fire of the tenth day of November, A. D. 1883, and as alleged in plaintiffs' declaration.

BLODGETT & PATCHIN,
Defendant's Att'ys.

To Moore & Canfield, plaintiffs' attorneys.

Indorsed: 7132. U. S. circuit court, east. dist. of Mich. John W. Wickham, Jr., *et al. v.* The Fire Insurance Association. Certificate of division of opinion. Filed March 2, 1888. Walter S. Harsha. clerk.

94 Supreme Court of the United States.

FIRE INSURANCE ASSOCIATION OF LONDON (Limited), Defendant below and Plaintiff in Error,

vs.

JOHN W. WICKHAM, JR., and WILLIAM B. COMSTOCK, Plaintiffs below and Defendants in Error.

In the above-entitled cause it is stipulated by the attorneys for the parties thereto that under the provisions of section 9 of rule 10 of the Supreme Court Rules, passed on the 28th day of March, 1887,

that the following-described papers may be printed in said cause, and no others, namely:

The certificate of division, signed by the circuit and district judges, and the papers thereto annexed, viz:

1. The charge of the court to the jury.
2. Exhibit "A," being an agreement between the parties and the insurance companies as to the appraisal of the loss referred to in said cause.
3. A copy of the declaration.
4. A copy of the plea and notice.

F. H. CANFIELD,
Att'y and Counsel for Def't in Error.
C. T. WALKER,
Att'y for Pl'ff in Error.

95 [Endorsed:] Sup. Court U. S. 1888, Oct'r term. No. 1032. The Fire Association (Limited), pl'ff in err., *vs.* Jno. W. Wickham, Jr., *et al.* Stipulation as to printing record.

[Stamped:] Office Supreme Court U. S. Filed Jul. 9, 1888. James H. McKenney, clerk.

Endorsed on cover: E. Michigan C. C. U. S. No. 1032. The Fire Insurance Association (Limited), plaintiff in error, *vs.* John W. Wickham, Junior, and William B. Comstock. Filed July 2nd, 1888.

96 The Supreme Court of the United States.

THE FIRE INSURANCE ASSOCIATION OF LONDON (Limited), Defendant below and Plaintiff in Error,

vs.

JOHN W. WICKHAM, Jr., and WILLIAM B. COMSTOCK, Plaintiffs below and Defendants in Error.

Error to the Supreme Court of United States.

And now comes the said Fire Insurance Association, plaintiff in error, by C. I. Walker, its attorney, and avers that in the record and proceedings aforesaid there is manifest error in the following particulars, to wit:

That the said circuit court of the United States for the eastern district of Michigan erred—

1st. In overruling the objection of defendant below to the introduction of the testimony offered by the plaintiffs below, as set forth in the 10th paragraph of said certificate of division, and in overruling the objection of said defendant below to the introduction of the testimony as stated in the 11th paragraph of said certificate of division.

2nd. That said circuit court erred in admitting the testimony offered by the plaintiffs below, as set forth in the 13th and 14th paragraphs of said certificate, against the objection of said defendant below, as set forth therein.

3rd. Said circuit court also erred in refusing to give the
97 request of the defendant below to charge the jury that said defendant below was entitled to a verdict.

4th. That said court erred in admitting the parol testimony offered in evidence by the plaintiff to vary and contradict the certificate of January 10th, being Exhibit "Q Q," and the receipts and drafts fully set forth in said certificate.

C. T. WALKER,
Attorney for Plaintiff in Error.

I hereby acknowledge the service upon me, as the attorney of the defendant in error, of a copy of the foregoing assignments of error in the cause therein mentioned.

Dated Detroit, July 12, 1888.

F. H. CANFIELD,
Att'y & Counsel for Def't in Error.

[Endorsed:] Supreme Court U. S. Oct. term, 1888. No. 1032. The Fire Insurance Association (Limited), pl'ff in error, *vs.* John W. Wickham, Jr., *et al.* Assignment of errors.

[Stamped:] Office Supreme Court U. S. Filed Jul. 14, 1888. James H. McKenney, clerk.

UNITED STATES OF AMERICA.

SUPREME COURT

OCTOBER TERM, 1888.

No. 1032.

THE FIRE INSURANCE ASSOCIATION
(LIMITED)
Plaintiff in Error,

vs.

JOHN W. WICKHAM, JR., AND
WM. B. COMSTOCK,
Defendants in Error.

Motion to Dismiss.

BRIEF FOR PLAINTIFF IN ERROR.

F. A. BAKER,
Counsel for Plaintiff in Error.

DETROIT:
John F. Eby & Co., Printers, 65 & 67 West Congress St.
1888.

Supreme Court of the United States.

October Term, 1888

No. 1032.

THE FIRE INSURANCE ASSOCIATION (Limited),
Plaintiff in Error,
vs.
JOHN W. WICKHAM JR., WILLIAM B. COMSTOCK,
Defendants in Error.

Motion to dismiss Writ of Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Omitting all unnecessary details this case can be stated as follows: The action was on two policies of fire insurance, on the propeller St. Paul. The defense was accord and satisfaction. The plaintiffs proved the insurance, and a loss. They further proved an adjustment of the loss on both policies at $1,920.60, and the presentation of formal proofs of loss with the statement that they would make a further claim "for expenses of raising the propeller."

They further proved said expenses aggregated $15,000. (*Record, pp. 3 to 6.*) This constituted the plaintiffs *prima facie* case.

The defendant, to establish its defense of accord and satisfaction, introduced two receipts signed by the plaintiffs, acknowledging the payment to them of $1,344.42 and $576.18 or a total of $1,920.60, "in full of all claims and demands for loss or damage by fire," to the property insured, and each of which receipts contains the further express provision that, "in consideration of said payment, said policy is hereby cancelled and surrendered to said company, and all further claims, by virtue of said policy forever waived." (*Record, p. 6.*)

The defendant also introduced a number of other receipts, showing a similar settlement with some other companies involved in the same loss. (*Record, pp. 7–11.*) It also introduced a memorandum, Exhibit "Q. Q.," showing an apportionment of the total loss among the different companies, corresponding with the amounts receipted for. (*Record, p. 11.*)

The defendant having rested, without any other proof than the written evidence so offered, plaintiffs in rebuttal offered evidence tending to show the following facts:

1. That at a meeting of the companies interested in the loss, a communication was received from a Detroit adjuster "in relation to expenses incurred in saving propeller St. Paul," and it was voted not to grant "the request of the assured to help him out," but that the companies be recommended "to pay the amount of the claim as set forth in the proofs of loss," and that a committee of two was appointed "for the purpose of conference with the owner." (*Record, pp. 11-12.*)

2. That this committee, consisting of Messrs. Wellman and Oakley, met one of the plaintiffs, Mr. Wickham, the next day, and notified him that "they were appointed such

committee, and that the companies were ready and willing to pay the expense of making the repairs occasioned by said fire as set forth in the proofs of loss." "That Wickham called attention to the claim for raising and saving the vessel, stating that he expected to get a contribution to such expense from the owners of the cargo of said vessel upon a general average, and for the sake of settlement offered to share the balance of such expense with the fire insurers in the proportion that the insured interest in the steamer bore to the amount insured."

"That the committee replied that the companies were not liable for such expense, and that they had no authority whatever to consider the claim for raising and saving the steamer, and thereupon gave to said Wickham," a memorandum showing the action taken at the meeting of the companies, stating to him "that the same was a record of the proceedings of the meeting at which they were appointed such committee, and that their authority was limited by the terms of the resolution adopted at such meeting," and "that they could not go beyond it or consider this claim for raising and saving the vessel even if they were disposed to do so." (*Record, p. 12.*)

3. "That said committee further stated that said companies were satisfied with the adjustment and proofs of loss, and were ready and willing to pay the cost of making the repairs to said steamer necessitated directly by the fire without discount, and would waive any rights they might have under the policies making the loss payable in sixty days from the time the proofs were furnished. The plaintiffs were never requested to compromise or release their claim for the expense of raising and saving the vessel, nor was the release or compromise of said claim spoken of except by Wickham when he offered to settle as hereinbefore stated, which offer was declined by said committee as above stated upon the ground that they had no authority to consider the matter." (*Record, p. 13.*)

4. "That at said interview Mr. Oakley, on behalf of the Mechanics' Insurance Co., gave to Wickham a check for the amount of the loss, adjusted as aforesaid, against the company, being $960.30, and Wickham then signed the aforesaid receipt for that amount to said company." (*Record, p 13.*)

5. That after the receipts were signed and delivered, the memorandum, Exhibit "Q Q," "was prepared under the direction of said Oakley and given to Wickham to exhibit to the representatives of other companies, to show the amount of said adjusted loss which had been apportioned against said companies respectively." (*Record, p. 13.*)

OBJECTIONS.

The defendant objected to the introduction of this parol testimony tending to contradict the receipts and drafts given in evidence, and the certificate, or memorandum, showing the apportionment, "upon the ground that such evidence was not admissible in the absence of fraud, misrepresentation and mistake." (*Record, p. 13.*)

There was no evidence that the receipts and discharges were obtained by any fraud or misrepresentation of the defendant or its agents. (*Record p. 17*).

The circuit judge and the district judge were divided upon the question of the admissibility of the parol evidence so objected to, and they have certified their disagreement to this court. (*Record, pp. 13, 17, 18.*)

Can there be any possible question but that the admissibility of this evidence is a question of law within the meaning of the statute relative to certificates of division, and that it has been properly certified?

I.

The point certified is a question of law.

Whether certain evidence is admissible on a jury trial is necessarily a question of law. If a question of fact it would have to be submitted to the jury. It would not be within the province of the judges, and they would have no business or occasion to divide on it or to certify it.

The evidence in question was objected to, and it was admitted because the circuit judge so ruled, and the question is, was that ruling correct?

We think not.

All of the testimony so admitted, relates to what occurred between the committee and Mr. Wickham, in the interview which led up to and resulted in the execution by Mr. Wickham for himself and partner, of the full discharge and release contained in the receipts, and no act or word is shown having the slightest tendency to prove that Mr. Wickham was misled, deceived or imposed upon in any way. All that the evidence amounts to is that Mr. Wickham called their attention to the additional claim and wanted them to share it with him, but they refused to do so, and thereupon he accepted what they offered to pay (to wit, the loss by fire as adjusted), and executed the receipts in full. The ruling of the circuit judge is no more or less than this, that the details of the conversation and negotiations resulting in the compromise, are admissible in evidence to prove that the parties did not intend to do what they did do, although there are no facts or circumstances shown by such details indicating any misconception or misunderstanding of the actual transaction.

It is true the judges in certifying this point refer to "the facts stated in the foregoing record," but all that means is,

that certain facts had been shown by the plaintiffs and certain other facts had been shown by the defendant, and as the proofs stood, at the time the ruling was made, was the parol evidence admissible or not. The words used do not mean that this court is to determine any question of fact from the record, but simply that the court is to examine into the proceedings on the trial and the state of the proofs, for the purpose of deciding what the rule of evidence is in such a case. Suppose the amount involved was within the jurisdiction of this court, and a bill of exceptions had been prepared in precisely the same way, would there be any doubt but that a question of law would be presented for the determination of this court?

The evidence admitted was subsequently submitted to the jury as containing something that would warrant them in finding that the claim for raising the vessel "was not intended to be included in these receipts and in the settlement." (*Record, p. 21, folio 65.*)

If the evidence was not competent proof to establish that fact, or was not pertinent to that question, it was not admissible as a matter of law, and it should have been excluded.

II.

The question occurred on the trial of a civil suit before a circuit court, held by a circuit judge and a district judge.

The question certified is not an abstract question of law, having no connection with any civil suit or proceeding, but actually arose on the trial of a cause before a jury, and sufficient of the proofs and proceedings on that trial are set forth and certified to show what the question was, and that it actually occurred, or arose during the trial.

It would not have been sufficient to have stated the question in the abstract, and simply asserted that it arose on the

trial, but it was absolutely necessary to set forth enough of the proceedings and proofs to enable this court to judge for itself whether the question occurred on the trial within the meaning of the statute.

III.

The opinions of the circuit judge and district judge were opposed to each other.

The evidence objected to was admitted on the ruling of the circuit judge and, of course, the district judge in charging the jury, had to charge them on the case as it stood. He had no power to exclude the evidence the circuit judge had admitted. He was obliged, in giving his instructions, to proceed in subordination to the rulings already made by the circuit judge, who outranked him in authority.

In *Railroad Co. vs. White*, 101 U. S., 98, the question arose on a motion for a new trial but the certificate did not state how the judges stood. As a judgment was entered for the plaintiff, the defendants motion for a new trial being denied, it was properly assumed by this court, that the circuit judge was with the plaintiff, and as the district judge in his opinion on the motion was also with the plaintiff, it was evident that there was no disagreement.

While in the present case, the record is clear that upon the question of the admissibility of the evidence, the district judge did disagree with the circuit judge, and that in subsequently charging the jury he took the case as it was, and that he simply submitted to the jury, as he was obliged to do, the evidence which the circuit judge had held was admissible.

No other course could have been pursued, unless it was incumbent on the district judge in order to adhere to his

position on the question of the admissibility of the evidence, to have refused to charge the jury, or to take any further part in the case unless the circuit judge acceded to his views, and permitted him to rule out the evidence before the charge commenced, or to instruct the jury that the evidence was not admissible and should not be considered by them.

We submit it was not necessary for the district judge to continue his disagreement with the circuit judge to any such extent, or to carry it along to the very end of the trial. Such a course on his part would have been petty and mulish, and was not necessary to show to this court that he did actually disagree with the circuit judge on the question of evidence.

We submit that the motion to dismiss ought to be denied.

F. A. BAKER,
Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
OCT 19 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE

UNITED STATES.

THE FIRE INSURANCE ASSOCIATION (Limited), *Plaintiff in Error,*

vs.

JOHN W. WICKHAM, JR., and WILLIAM B. COMSTOCK, *Defendants in Error.*

No. 59.
October Term, 1891.

Brief for Defendants in Error.

F. H. CANFIELD,

Counsel for Defendants in Error.

DETROIT, MICH.
O. S. GULLEY, BORNMAN & CO., PRINTERS, 12 TO 18 LARNED STREET EAST.
1891.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE FIRE INSURANCE ASSOCIATION (Limited),
Plaintiff in Error,
vs.
JOHN W. WICKHAM, JR., and WILLIAM B. COMSTOCK,
Defendants in Error.

No. 59.
October Term, 1891.

BRIEF FOR DEFENDANTS IN ERROR.

This cause comes into this court upon a certificate of division of opinion of the judges of the court below upon two questions:

1. Whether on the *facts stated in the record*, the parol testimony offered in evidence by the plaintiff was admissible to vary and contradict the certificate of January 19th, Exhibit QQ., and the receipts and drafts set forth in the record?

2. Was the defendant entitled to a verdict under the facts set forth in the record?

The case has already been before the court upon a motion to dismiss for want of jurisdiction, (see 128 U. S., 426), and it was there held that the second question was improperly certified and can not be considered by this court.

The *only* question, therefore, which remains for discussion is the first one certified, as to the admissibility of the parol testimony which was offered at the trial by the defendants in error.

In order to properly answer the question, it is necessary to understand clearly just what were the facts of the case as presented at the trial, and as certified by the court, and established by the verdict of the jury. These facts may be stated, as follows:

The defendants in error are the owners of the steamer St. Paul. She was insured by the plaintiff in error under two policies, for the sum of $5,000 against loss or damage by fire from April 1st, 1883, to April 1st, 1884. In addition to the plaintiff in error, the steamer was also insured by certain other underwriters, whose names, and the amounts insured, are set forth at page 5 of the record. On November 10th, 1883, while the steamer was on a voyage from the lower lakes to Lake Superior, a fire broke out in her hold, to extinguish which it became necessary to scuttle and sink the steamer. She was subsequently raised at a considerable expense, and brought to Detroit for repairs, arriving on November 19th. On November 24th, while her cargo was being unladen in order to make such repairs, fire again broke out in her hold, to extinguish which she had to be again sunk, and afterwards was again raised at great expense. (Rec., 4-5.)

After the steamer had been raised the second time, and on December 15th, the several insurance companies having risks upon her, by their adjusters, entered into a written agreement with the owners for the appointment of appraisers to estimate the cost of repairing the damages done to the hull, machinery, and furniture. (Rec., 5.)

A copy of this agreement is set forth in the record as Exhibit A. (Rec., 26.)

Before this agreement was signed by the insurers, this significant clause was added or inserted therein: "*But this agreement does not apply to or cover any question that may arise for saving boat and cargo.*"

So it appears that the duties of the arbitrators or appraisers, under this submission, were confined to estimating the cost of repairing the steamer; or what the court below (Rec., 21) termed "the direct loss by fire," and did not include the cost of raising and rescuing the steamer and bringing her to a port of repair, or what is termed the "wrecking or salvage expenses." (Rec., 20.) The bills for these salvage expenses had not come in, and their amount was not then definitely known.

The adjustment or estimate by the appraisers, under this agreement, was completed December 26th, 1883, and thereupon W. D. Allen, *the adjusting agent of the insurers*, made out formal proofs of loss, and on January 12th, sent them from Buffalo to the several companies, who received them in due course of mail.

The cost of the repairs, as fixed and determined by the appraisers, exclusive of the salvage expenses, amounted to $15,364.78, and the claim set forth in the formal proofs of loss was *limited to that sum.* The adjusting agent, in sending in said proofs of loss, sent with them to each of the companies the following letter: (Rec., 5.)

"W. D. ALLEN,
General Fire-Adjusting and Supervising Agent,
No. 20 Irving Place,
Buffalo, January 12th, 1884.

Gentlemen:—I enclose herewith proofs, Jno. W. Wickham, Jr., managing owner, for loss and damage prop. St. Paul, which, I trust, will be found satisfactory:

The claim as made covers only the loss and damage by fire and water, as per agreement, on the tackle, awnings, apparel, furniture, etc., of..	$ 1,735 08
And the appraisers' award on hull, engines, mach'y, etc., of.....	13,629 70
Aggregating in all.....	$15,364 78

The assured will make further claims for expenses of raising the propellor, and is now preparing the statement of such expenses to submit with his subsequent claim.

Yours truly,
W. D. ALLEN,
Adjuster."

The amount of the loss, according to the appraisal of the arbitrators and said proofs of loss, was apportioned as follows:

Continental Insurance Co	$2,880 90
Liverpool and London and Globe	2,304 70
Fire Insurance Association, 2 policies	1,920 60
Queen's Insurance Co., 2 policies	2,688 84
Security Ins. Co. of New Haven	960 30
Exchange Ins. Co. of New York	960 30
Mechanics' Fire Ins. Co. of New York	960 30
German Insurance Co. of Pittsburgh	960 30
Prescott Ins. Co	960 30
Greenwich Insurance Co	768 24
In all	$15,364.78

The expenses of raising and saving the steamer, besides the cost of the repairs, exceeded $15,000.00. ($15,364.78.) In other words, the entire loss which the plaintiffs suffered in consequence of the fire amounted to $30,729.56, and was made up of *two distinct items*, and was regarded by the parties at the time as comprising two distinct claims, viz.:

A.	Cost of repairing steamer as per appraisal or adjustment and proofs of loss	$15,364.78
B.	Salvage expenses	15,364.78
	Total	$30,729.56

The proportion of the cost of the repairs, as adjusted and set forth in the proofs of loss, due from the plaintiff in error in this case, was $1,920.60. Its proportion of the salvage expenses, with interest to the trial, according to the verdict, was $2,297.65.

At the trial the plaintiffs admitted that they had been paid the cost of repairing the steamer, but claimed that they were also entitled to the salvage expenses.

The defendant based its defense upon the plea of accord and satisfaction, (Rec., 52, 53,) insisting that the payment was made by way of compromise of plaintiffs' entire claim, including the salvage expenses, as well as the cost of the repairs. (Rec., 6.)

The plaintiffs insist that the payment which they had received was the *exact amount of the cost of repairing* the steamer as fixed by the appraisers or arbitrators, and as set forth in the proofs of loss, which had been prepared and furnished by the insurers' own adjuster, and that the payment was intended to apply *only* to this *adjusted claim*; and that in making such payment the cost of raising and saving the steamer was not taken into consideration at all, because the insurers at the time disclaimed and repudiated all liability whatever therefor.

There was no controversy at the trial as to the amount of either of these claims.

To prove its defense, the defendant offered the following receipts given by the plaintiff to the defendant: (Rec., 6, 7.)

"$1,344.42. January 19, 1884.

Received from the Fire Insurance Association, of London, England, thirteen hundred and forty-four $\frac{42}{100}$ dollars, it being in full of all claims and demands for loss or damage by fire which occurred on the 10th and 24th days of November, 1883, to property insured by policy No. 180,617, Buffalo, New York, Agency, and in consideration of said payment, said policy is hereby cancelled and surrendered to said company, and all further claims by virtue of said policy forever waived.

Signed.

JOHN W. WICKHAM, JR.,
Managing Owner.

W. B. COMSTOCK,
Per Wickham.

Claim, $1,344.42.
Discount, ...
Draft, $.....

There was a receipt endorsed upon policy No. 180,617, as follows:

"January 19, 1884.

In consideration of four $\frac{47}{100}$ dollars return premium, the receipt of which is hereby acknowledged, this policy is

cancelled and surrendered to the Fire Insurance Association, (Limited), of England.

Signed,

JOHN W. WICKHAM, JR.,
Managing Owner.

W. B. COMSTOCK,
Per Wickham, Jr."

The other receipt given to the Fire Insurance Association is precisely like the first, except as to the number of policy and amount, and is as follows:

"$576.18. January 19, 1884.

Received from the Fire Insurance Association, of London, England, five hundred and seventy-six $\frac{18}{100}$ dollars, it being in full of all claims and demands for loss or damage by fire which occurred on the 10th and 24th days of November, 1883, to property insured by policy No. 181,-252, Buffalo, N. Y., Agency, and in consideration of said payment said policy is hereby cancelled and surrendered to said company, and all further claims by virtue of said policy forever waived.

JOHN W. WICKHAM, JR.,
Managing Owner.

W. B. COMSTOCK,
Per Wickham, Jr.

Claim.... $576.18.
Discount, ...
Drafts, $....."

And as corroborative proof, defendant also offered in evidence the receipts given to the other companies having risks upon the steamer, which are set forth in the record on pages 7, 8, 9 and 10; and also offered the following paper, Exhibit QQ. (Rec., 11.)

EXHIBIT QQ.

"NEW YORK, *January 19th*, 1884.

This is to certify that the loss and damage by fire which occurred on the 23d day of November, 1883, to the steamer St. Paul, is this day adjusted for the sum of fifteen thousand, three hundred and sixty-four and $\frac{78}{100}$ dollars, $15,364.78, payable without discount upon presentation of the policies to the several companies interested by the

assured, and apportioned among the several companies as follows, viz.:

	Insures.	Pays.
Continental, of New York.	$7,500	$2,880.90
London & Liverpool & Globe.....	6,000	2,304.70 Paid.
Fire Insurance Association.	3,500	1,344.42 Paid.
Queen's, of England.....	7,000	2,688.84 Paid.
Fire Ins. Ass'n, 2d policy..	1,500	576.18 Paid.
Security, of New Haven..	2,500	960.30 Will remit.
Exchange, of New York..	2,500	960.30 Paid, 1, 19,'84
Mechanics, of New York..	2,500	960.30 Paid, 1, 19,'84
German, of Pennsylvania..	2,500	960.30 Will remit.
Prescott Insurance Co....	2,500	960.30 Remitted.
Greenwich, of New York.	2,000	768.24 Paid, 1, 19, '84
	$40,000	$15,364.78

Signed,

JOHN W. WICKHAM, JR.,
Managing Owner.

W. B. COMSTOCK,
Per John W. Wickham, Jr.

JOHN K. OAKLEY,
J. H. WELLMAN,
Committee.

Defendant then rested: and the plaintiff in rebuttal offered evidence tending to show that in January, 1884, said Wickham went to New York: that on the 18th of January a meeting of the companies interested in said loss was held at the Board Rooms in New York, at which meeting Messrs. Wellman and Oakley were appointed as a committee to confer with the plaintiff in regard to said loss. Of this meeting Wickham had no notice and was not present. That on the following day said Wickham met said Wellman and said Oakley, and was notified by them that they were appointed such committee, and that the companies were ready and willing to pay the expense of making the repairs occasioned by said fire, as set forth in the proofs of loss hereinbefore mentioned; that Wickham called attention to the claim for raising and saving the vessel, stating that he expected to get a contribution to such expense from the

owners of the cargo of said vessel upon a general average, and, for the sake of settlement, offered to share the balance of such expense with the fire insurers in the proportion that the uninsured interest in the steamer bore to the amount insured; that the committee replied that the companies were not liable for such expense, *and that they had no authority whatever to consider the claim for raising and saving the steamer*, and thereupon gave to said Wickham the following paper, marked Exhibit PP, stating to him that the same was a record of the proceedings of the meeting at which they were appointed such committee, *and that their authority was limited by the terms of the resolution adopted at such meeting and set forth in said Exhibit, and that they could not go beyond it or consider this claim for raising and saving the vessel even if they were disposed to do so.*

The paper referred to is as follows:

"EXHIBIT PP.

BOARD ROOMS, January 18, '84.

Meeting of the companies interested in loss on propellor St. Paul.

Present:

Continental	$7,500 00
Fire Ins. Ass'n	5,000 00
Queen's	7,000 00
Exchange	2,500 00
Mechanics, N. Y.	2,500 00
Greenwich	2,000 00
	$26,500 00

Organized by Mr. Wellman, Chairman.

Communication from Jno. M. Murray, Adjuster, at Detroit, in relation to expenses incurred in saving propellor St. Paul.

On motion, duly seconded,—

That the request of the assured to help him out is not granted, but the companies are recommended to pay the amount of claim as set forth in the proofs of loss. Carried.

Meeting adjourned.

(Signed) G. W. MONTGOMERY.

On motion, the action of the meeting be referred to a committee of two for the purpose of conference with the owner. Carried.

Chair appointed Mr. Oakley and Mr. Wellman."

A part of this paper was in the handwriting of Mr. Wellman.

Plaintiff also offered evidence tending to show that said committee further stated that the companies were satisfied with the adjustment and proofs of loss, and were ready and willing to pay the cost of making the repairs to said steamer necessitated directly by the fire, without discount, and would *waive any rights they might have under the policies making the loss payable in sixty days from the time the proofs were furnished.* The plaintiffs were never requested to compromise or release their claim for the expense of raising and saving the vessel, nor was the release or compromise of said claim spoken of except by Wickham when he offered to settle, as hereinbefore stated, which offer was declined by said committee, as above stated, upon the ground that they had no authority to consider the matter.

Plaintiffs also offered evidence to show that at said interview Mr. Oakley, in behalf of the Mechanics' Insurance Company, gave to Wickham a check for the amount of the loss adjusted as aforesaid against that company, being $960.30, and Wickham then signed the aforesaid receipt for that amount to said company; and *after the receipts were signed and delivered*, said paper, Exhibit QQ, was prepared under the direction of said Oakley and given to Wickham to exhibit to the representatives of the other companies to show the amount of said adjusted loss which had been apportioned against them respectively.

The defendant objected to the introduction of this parol testimony; the objection was overruled; and the evidence received and submitted to the jury; the defendant then, in its behalf, introduced certain contradictory testimony, set forth at pages 13, 14 and 15 of the record.

Plaintiffs also offered evidence to prove that after

Exhibit QQ, viz., the certificate of January 19th, 1884, had been signed, Wickham was asked to surrender his policies under the following clause therein contained, viz.:

"This insurance may be terminated at any time at the "option of the company, on giving notice to that effect to "the insured, either verbally or by leaving such notice at "his last known place of residence or business. In such "case the insured shall be entitled to claim a ratable pro- "portion of the premium for the unexpired term for which "the policy was to run."

And that the surrender of said policies was made in compliance with such demand under said clause, in consideration of the payment to him of the unearned premiums.

It does not appear that this last mentioned evidence was objected to, but the defendant offered evidence to show that the surrender of said policies was made as a part of the accord and satisfaction set forth in the plea filed in said cause.

It is proper here to call attention to the settlement that was made with the Continental Insurance Company, and to ask the court to notice particularly the difference between the receipt given that company, and the receipts given to the defendant and to the other companies against whom suits were brought. Clearly, as to the Continental, there was a compromise of the claim for the salvage expenses, and a consideration paid sufficient to support the compromise. Plaintiffs undoubtedly did agree to release their claim for these expenses as against the Continental, and they have never attempted to repudiate that agreement. No suit has been brought against that company.

The amount covered by the receipts before referred to was *just the amount claimed under the proofs of loss*, but it was paid about fifty-five days before the same was due, as, by the terms of all the policies, save one, the amount of loss was not payable until sixty days after the proofs of loss were furnished to the insurance companies, and this was not earlier than January 14th, 1884.

The court held, as will appear by the charge contained

in the record, that this prepayment before the amount became due was a good consideration for the settlement and discharge of the whole claim, *if such settlement and discharge was actually made*, and *if it was so understood and agreed by the parties.*

The defendant claimed that the certificate of apportionment, Exhibit QQ, with the receipts and drafts, as a matter of law show a full settlement of the entire claim, and are accord and satisfaction thereof. Plaintiffs claim that the settlement related solely to the loss covered by the proofs of loss already mentioned, and was not intended to, and did not, embrace the claim for salvage expenses.

The case was submitted to the jury under the charge of the court, and a verdict rendered for the plaintiff. (Rec., 17.)

We desire at this point to call attention to the instructions given by the court to the jury, under which the verdict was rendered.

The jury were instructed that the insurers were liable for the salvage expenses, as well as for the cost of repairing the steamer; that the receipts and the memorandum of adjustment, Exhibit QQ, together with the cancellation of the policies, were *prima facie* a full discharge of defendants from all claims of the plaintiffs under the policies, and that the plaintiffs could not recover unless they proved either that this salvage claim was not intended to be included in these receipts and in the settlement, *or that there was no consideration for the release of this claim*, and that the burden was upon the plaintiffs to show these facts by a preponderance of testimony. The court said:

"Did these parties compromise and settle, understanding they were compromising and settling the plaintiffs' entire claim against these insurance companies? If such was the understanding between the parties, *and there was a consideration for it*, it is a perfect defense to this suit." On the question of consideration the jury were instructed that the defendants were not liable to pay the loss until sixty days

had elapsed after the proofs of loss were served upon the companies, and that the payment fifty-five days in advance of the time when it would become due, without discount for interest, was of itself a sufficient consideration for waiving the plaintiffs' further claim under the policies, *if it was understood as such*, but that this prepayment to be a sufficient consideration for the release of the plaintiffs' claim for the wrecking expenses, *must have been understood between the parties to be such.* As to the surrender of the policies, the jury were instructed that if they found that "they were surrendered in consideration of the *unearned premiums stated in the receipt indorsed on the policies*, then the defense of a surrender is no defense in this suit, and while the surrender has a tendency to show plaintiffs' relinquishment of all rights under the policy, still it is not conclusive evidence, if the jury found that the surrender was made in consideration of the unearned premiums." (Rec., 25.)

The precise question certified, and upon which the judges of the court below are said to have been divided in opinion, reads as follows:

"On the facts stated in the foregoing record, was the parol testimony offered in evidence by the plaintiffs admissible to vary and contradict the certificate of January 19th, (Exhibit QQ,) and the receipts and drafts set forth in the record?"

To properly answer this question, as we have already stated, the facts established by this record must be clearly perceived and borne in mind. They may be summed up as follows:

1. That the plaintiff's entire loss in consequence of the fire was $30,729.56.

2. That from the beginning the insurers regarded this loss as consisting of two distinct claims or items; or, as stated by counsel for plaintiff in error in his brief filed in this court upon the motion to dismiss, there were two distinct classes of loss growing out of these fires:

a. The expense of repairing the steamer.

b. The salvage expenses.

This is shown by Exhibit A, the agreement for submission to appraisers (Rec., 26, 27,), by the formal proofs of loss prepared by the insurers' own adjuster, Allen, and by Allen's letter, which accompanied the proofs of loss, and which may be considered as a part of them.

3. That the insurers from the outset admitted their liability for the cost of repairs, but denied their liability for the claim for the salvage expenses, *and refused to consider that claim.*

This is shown by the proceedings at the meeting of the insurers, held at the Board Rooms, January 18th, 1884, the *written record* of which was offered in evidence at the trial and from which it appears that the insurers then resolved "that the request of the assured to help him out is not granted, but the companies are recommended to pay the amount of claim as set forth in the proofs of loss." It will be admitted that the expression, "request of the assured to help him out," refers to his claim for the salvage expenses referred to in the communication from the adjuster, which was then before the meeting, and that the amount of claim as set forth in the proofs of loss means the cost of the repairs.

4. That at the meeting which adopted the resolution referred to, Messrs. Oakley and Wellman were appointed as a committee to confer with the plaintiff Wickham; that when they met Wickham he stated that he expected to get a contribution to these salvage expenses from the owners of the cargo of the vessel, upon a general average, and for the sake of settlement offered to share the *balance* of such expenses with the fire insurers in the proportion that the uninsured interest in the steamer bore to the amount insured, but that the committee replied that the companies were not liable for such expense, and that they (the committee) *had no authority whatever to consider the claim for raising and saving the steamer;* and thereupon gave to Wickham the paper, Exhibit PP, (Rec., 12,) stating that it was a record of the proceedings of the meeting at which they were

appointed such committee, and that their authority was *limited* by the *terms of the resolution adopted at such meeting and set forth in said exhibit*, and that they could not go beyond it *or consider* this claim for raising and saving the vessel, *even if they were disposed to do so.*

5. That the committee then informed Wickham that the companies were ready and willing to pay the cost of making the repairs to the steamer without discount, and would *waive* any rights that they might have under the policies, making the loss payable in sixty days from the time the proofs were furnished.

That such a meeting was held, and that such a committee was appointed, and that they met Wickham, and that the paper, Exhibit PP, was a record of the proceedings of the meeting which appointed the committee, are *facts* about which there is no dispute whatever, and, under the verdict of the jury, the fact must also be considered as established that Messrs. Oakley and Wellman, as the representatives and agents of the insurers, informed and notified Wickham that the insurers *would not consider* the claim for salvage expenses, and that they, the committee, could not do so even if they were so disposed; that the insurers were ready and willing to pay the cost of the repairs, and that they would *waive* the right to delay payment until the expiration of the sixty days after the service of the proofs of loss.

We submit that the parol evidence was admissible.

I.

THE CERTIFICATE AND THE RECEIPTS ARE NOT CONTRACTS; THEY ARE NOT OF SUCH A CHARACTER AS TO PRECLUDE THE ADMISSION OF OTHER TESTIMONY TO EXPLAIN OR QUALIFY THEM.

The question certified relates to the admission of parol testimony as affecting both the certificate, Exhibit QQ, and the receipts given to the plaintiff in error. For convenience, we will first consider the admission of the testimony as affecting the certificate.

A. The Certificate, Exhibit QQ.

It is a well established principle that before the court can apply the rule which excludes parol testimony to vary or contradict a written contract, it must first be shown that the writing in question constitutes a contract or the record of a contract between the parties.

Did the parties intend the writing to be a contract between them? Is this certificate a contract?

In Waihe vs. Harrop, 6 H. & N. 775, it is said:

"It is always open to the parties to show whether or not the written document is the binding record of the contract."

In Pym vs. Campbell, 6 Ellis & B. 370, Compton, J., said:

"The parties may not vary a written agreement, but they may show they never came to any agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to show that, does not vary an agreement and is admissible;" and Erle, J., said, "the distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

In Mobile & Montgomery R. Co. vs. Jurey, 111 U. S. 591, parol evidence that goods, for which a bill of lading had been given, were shipped under a parol contract was objected to, as here, on the ground that it contradicted the bill of lading. The Court said:

"The contention is that the bill of lading was the contract, and being in writing, no parol evidence could be received to vary the stipulations. Before this rule can be applied, the contract in writing must be shown to be the contract of the parties. One of the vital questions in the case was, what was the contract between the parties? It is plain, upon the statement of the controversy, that evidence of the parol contract was perfectly competent and it was a question to be decided by the jury whether the understanding as detailed by the witnesses, or the bill of lading, expressed the agreement of the parties."

These authorities go quite beyond the rule for which we contend in the present case: especially so as regards the certificate of adjustment, Exhibit QQ, because that document *upon its face* does not purport to be a contract.

A contract may be defined to be an agreement of two

or more persons, upon sufficient consideration, to do, or not to do, a particular thing.

Now this paper is not an agreement or contract of any kind. It does not purport to be an agreement of compromise; it contains no words which have any such import. It does not contain any of the usual words expressing an agreement. It is simply a *certificate* or *declaration of a fact* which had been agreed upon. It does not contain the word "compromise" or any equivalent expression. Its language is simply this:

"This is to certify that the loss or damage by *fire* which occurred on the twenty-third day of November, 1883, to the steamer "St. Paul," is this day adjusted for the sum of fifteen thousand, three hundred sixty-four and $\frac{78}{100}$ dollars, ($15,364.78,) payable without discount, upon presentation of the policies to the several companies as follows," etc.

This amounts to nothing more than an ordinary adjustment of an insurance loss. It is a mere certificate of the amount of the loss and damage by *fire*, and the proportion of this amount to be borne by each of the underwriters. It is not a contract but only a certificate of adjustment, the legal effect of which is well settled.

In 3 STARKEY'S EVIDENCE, 1167, it is said "that an adjustment has been defined to be a written admission of the amount of the loss as stipulated between the parties to the policy of insurance."

LEE ON SHIPPING AND INSURANCE, 492, says that:

"'The adjustment is not final and conclusive as to matters appearing to have been adjusted, and, notwithstanding the adjustment, the sum therein stated is merely *an admission* by the underwriter, on the supposition of the truth of certain facts, that the assured are entitled to recover the amount adjusted on the policy. * * * And, in conformity with this opinion, it has been held that the adjustment is only evidence of the amount of the damages sustained by the loss."

In LUCKIE VS. BUSHBY, 4 J. SCOTT 77, 13 C. B., 862, 13 M. G. & S. 861, it was held that notwithstanding an adjustment has been made, the action in the case of a partial loss was still for unliquidated damages. Talfourd, J., said:

"The adjustment is undoubtedly strong evidence to determine the amount of the claim upon the policy, but it is not conclusively binding upon the parties."

In 2 PHILLIPS ON INSURANCE, SEC. 815, it is said:

"To render an adjustment binding, it must be intended to be absolute and final, and not a memorandum of a merely *prima facie* provisional understanding, subject to revision and revocation at the discretion of either party."

In 2 PARSONS ON MARINE INSURANCE, 356, it is said:

"An adjustment and a settlement under it will leave the insured his claim or remedy on the policy so far as the subject matter upon which the claim rests is not included in the adjustment," and it is also said that, "if the insured presents an adjustment and the insurers refuse to settle upon it, and the insured brings his action, he is not bound by the adjustment he has presented, but may offer a new one more favorable to himself."

In 1 TAYLOR ON EVIDENCE, SEC. 859, it is said:

"That the adjustment of a loss on a policy of insurance made without a full knowledge of all the circumstances, or under a mistake *of law or fact*, or under *other invalidating circumstances*, will not be conclusive, but is to be weighed with other evidence by the jury."

In HOTCHKISS VS. MOSHER; 48 N. Y. 478, it was held that a certificate issued by a bank is not a contract but an evidence of a debt in the nature of a receipt, and parol evidence is admissible to explain it, the same as in the case of a receipt. The court say:

"The certificate was simply an acknowledgment of so much "money deposited with the bank. It is of the same force and effect as "a receipt for money. The word 'certify' adds no additional force to "the instrument, as purporting a contract. It contains no promise on "the part of the defendants. * * * A certificate of acknowledgment "that another has deposited a sum of money, has the effect of an acknowledgment by one party that he has received a sum of money from "another. A simple certificate like the one in question is not the basis "of an action like a promise in writing, but would be evidence like a "receipt to raise an implied promise to pay in an action for money "had and received."

These authorities clearly show that an adjustment is not to be treated as a contract, but rather as a statement of account—a mere admission—and, like other admissions, subject to explanation by parol testimony.

This certificate contains no agreement or promise to pay. The words "payable without discount," do not import a promise. Thus it is held in numerous cases that where a mortgagor insures, and the loss is declared to be payable to the mortgagee, the mortgagor is still the promisee, and the action must be brought in his name.

28 Mich., 404. 10 Wall, 33.

If the word "payable" in such a policy does not amount to a promise, neither does the word "payable," in this certificate of adjustment, amount to a promise.

This certificate, if taken literally, would not be entitled to any weight, or be even admissible in evidence in this case, as it does not *upon its face, or by necessary implication*, include the claim for salvage expenses; nor does it, if taken literally, refer to either of the fires out of which the plaintiff's loss arose. It does not refer to a fire which happened on November 10th, nor to the fire which happened on November 24th. (Rec., 4.) But it only mentions a loss by fire which occurred on the *twenty-third* day of November. Doubtless this was a clerical mistake of the person who drew the certificate; still it is necessary for the insurers to go outside of the certificate to show that while it mentions only *one* fire, and that a fire which occurred on the twenty-third day of November, it nevertheless was intended by the parties to relate to *two* fires, one of which occurred on November *tenth* and the other November *twenty-fourth*.

Now, the parol evidence which was offered by the plaintiff, and admitted, tended to show (and under the verdict of the jury the fact must be regarded as established) that at the interview which took place between Wickham and Oakley and Wellman, the committee representing the insurers, nothing was said about this certificate until after the payment had been made by Oakley, and after the receipt therefor had been signed and delivered by Wickham, and that it was then prepared under the supervision of Oakley, and given to Wickham to exhibit to the repre-

sentatives of the other companies to show the amount of the adjusted loss which had been proportioned against said companies respectively. (See Rec., 13.) And this agrees substantially with the testimony in this regard which was offered by the defendants themselves, which is, substantially, that "a receipt was drawn up and signed and a check drawn to pay him, and that Wickham *then* said 'How am I to get my money from the rest of the companies?'" Mr. Oakley replied that "The loss had been compromised, and with our signatures, the companies will undoubtedly pay you." The certificate of January 19th was then drawn up by a clerk, and Mr. Oakley objected to it because it said nothing about a compromise, and ordered a new one to be written. When Wickham ascertained that it would take ten or fifteen minutes, he said, "The time is getting short. * * * * I will lose my chance for getting the train, etc., and that Mr. Oakley then consented to sign the certificate as it was," etc. (Rec., 14, 15.)

Thus it is shown by both parties that the certificate was not drawn until *after* Wickham had received his check from the Mechanics' Insurance Company and had given his receipt therefor. We have already called attention to the fact that no reference whatever is made in this certificate to the plaintiff's claim for salvage expenses, nor does the word compromise appear, or any equivalent expression. If the parties had entered into an agreement to compromise plaintiff's entire claim, if it was understood that the plaintiff was to surrender its claim for rescuing and saving the vessel, would not some proper words showing this fact have been embodied in the certificate?

This omission furnishes an almost conclusive argument that the committee, Wellman and Oakley, had no authority to consider this salvage claim, and that they did not in fact consider it. Even if the parol testimony were excluded, nevertheless the certificate, taken in connection with Exhibit P P, Rec. 12, the written submission, Exhibit A, shows that as a matter of law it should be construed as

not including, but as excluding, the plaintiff's claim to salvage expenses.

It can hardly be said that the parol testimony either avoids or contradicts that certificate.

The question as to the admissibility of parol testimony to affect the certificate, Exhibit Q Q, should be regarded as though that certificate was the only writing offered in evidence by the defendant.

The fact that other writings were offered has no bearing on the question as to the admissibility of parol testimony to affect the certificate. Now, suppose that certificate was the only evidence which the defendant relied upon, could it be claimed as a matter of law that it was conclusive, and that no parol testimony could be offered to affect it? We submit not.

But a stronger argument to show the admissibility of the parol testimony in this case as affecting both the certificate, Exhibit QQ, and the receipts which were given to the companies, is afforded by the language of the documents themselves when read in the light of the other written evidence in the case and the circumstances surrounding the parties at the time.

We have already called attention to the fact that plaintiffs' loss was regarded as consisting of *two distinct claims.*

The parties must have had this distinction in mind at the time the settlement was had. This appears not only from Wickham's testimony, Rec., 12–13, but also from the testimony of Oakley, Rec., 14, and of Wellman, Rec., 15.

The submission to appraisers, Exhibit A, Rec. 26, in which both classes of loss are mentioned as "the loss and damage by fire to the property" and the cost of "raising the boat and cargo"; the proofs of loss, furnished and prepared by their own adjuster, covering only this loss and damage by fire and accompanied by the letter from the adjuster referring to the other loss, "for expenses of raising the propellor," and the record of the meeting of the insurers, (see Exhibit PP, Rec., 12,) show that they resolved

to pay the loss and damage by fire, but not the other loss or claim.

The certificate, Exhibit QQ, mentions only, "the loss and damage by fire." The receipts given to the Fire Insurance Association, the plaintiff in error in this case, mention only "*the loss or damage by fire which occurred on the 10th and 24th of November, 1883;*" the receipt given to the Mechanics' Fire Insurance Co., mentions only "*the loss and damage by fire on the 23d day of November, 1883.*" The one given to the Queen's Insurance Association reads "*all loss and damage which occurred by fire on the 11th day of November, 1883;*" the one given to the L. L. & Globe Insurance Co. read: "*For loss and damage by fire which occurred on or about November 10th and 24th, 1883.*" The one given to the Security Insurance Co., reads: "*For loss or damage by fire which occurred on the 10th and 24th of November, 1883;*" that given to the Prescott Insurance Co. reads: "*For loss and damage by fire on the 24th day of November,*" and the one given to the German Insurance Co., is "*for loss and damage by fire on the 10th day of November, 1883.*"

Now while it may be true that, in a legal sense, the cost of raising and saving the vessel may be regarded as "a loss or damage by fire," it is clear that the officers and agents of these insurers did not so consider it, and the fact that only the loss by fire is mentioned in the certificate of adjustment and in the receipts, shows that these documents were intended to apply to *that* claim or loss and not to the claim for salvage expenses.

Why was not the claim for salvage expenses mentioned in some of these papers if that claim was intended to be included in the settlement? If there was a compromise of that claim, why did the parties omit to say so in the papers which were signed by them?

Here were two distinct claims or losses; only one of them is mentioned in the certificate or in any of the receipts to which we have referred, and these writings are therefore to be interpreted as excluding the one not mentioned,

defense if, as a matter of law, they are to be construed, as plaintiff in error insists, as contracts or writings of such a character as preclude the admission of other testimony to explain or qualify them.

If the parol testimony was not admissible—if these receipts are to be construed as contracts—there was no necessity for the defendant to offer any further proof at the trial. But the record shows that the defendant was not content to rest upon these receipts, but offered in evidence the receipts given to the other companies, the only legitimate purpose of which could be to *corroborate* and sustain the conclusion of fact which was sought to be drawn from the receipts which the defendant had itself received. In other words, these receipts which were given to the other companies could have been offered only to influence the jury in regard to the *fact* which the defendants sought to establish, and which it was for the jury to pass upon. So at the outset we find the defendant going outside of the receipts which it had received, for the purpose of attempting to corroborate these receipts upon a question of fact.

The parol testimony offered by the plaintiff was offered in *rebuttal*, and the question of its admissibility is to be considered as though the receipts given to the other companies had not been offered in evidence at all.

We submit that this parol testimony was admissible:

First: Because the receipts given to the defendant are not contracts, but are to be regarded simply as receipts or admissions which may be explained or contradicted by parol.

Second: If the receipts are to be construed as contracts, the evidence was admissible to show that the contract was *without consideration*, and therefore void; and also to show the circumstances surrounding the parties at the time they were given, and to aid the court in construing the writings and to apply them to the subject matter intended by the parties.

First: These receipts are not contracts and are to be regarded merely as receipts for the money actually paid and like all other receipts are at most but *prima facie* evidence, to be considered by the jury with the other evidence in the case. The scope and effect to be given them depends entirely upon the intentions of the parties at the time they were executed and this intention was a proper question for the jury.

Of the numerous authorities applicable we cite the following:

In LEE VS. LANCASHIRE, &C., RAILWAY CO, L. R. 6, CH. APP. CAS. 527, the plaintiff had been injured by a railway accident and sent in a claim of £691. The traffic manager called upon him to discuss the amount of his claim, and it was agreed that the company should pay the plaintiff £400 and all medical bills in relation to the accident. The payment was made and the plaintiff gave the following receipt: "*Received from "the Lancashire and Yorkshire Railway Co., the sum "of* £400 *in discharge of my claim in full upon that com- "pany for all loss sustained and expenses incurred by the "late accident at Miles Platting, including all the expenses "attending the same.*" Subsequently, the plaintiff, on the ground that his injuries were more serious and permanent than were supposed, commenced an action against the company, claiming £300 damages in addition to what he had been paid. Defendant pleaded accord and satisfaction; thereupon plaintiff filed his bill, alleging among other things that when he made the above settlement, both he and defendant's agents supposed that he would soon be quite well, and that relying on the accuracy of the statements and advice which he received in this respect, he accepted the £400; that he read and signed the receipts on the assurance of medical men that his injuries were only temporary; that he signed the receipts on the condition that he shonld not exclude himself from further compensation if such injuries eventually turned out to be more serious than was antici-

defense if, as a matter of law, they are to be construed, as plaintiff in error insists, as contracts or writings of such a character as preclude the admission of other testimony to explain or qualify them.

If the parol testimony was not admissible—if these receipts are to be construed as contracts—there was no necessity for the defendant to offer any further proof at the trial. But the record shows that the defendant was not content to rest upon these receipts, but offered in evidence the receipts given to the other companies, the only legitimate purpose of which could be to *corroborate* and sustain the conclusion of fact which was sought to be drawn from the receipts which the defendant had itself received. In other words, these receipts which were given to the other companies could have been offered only to influence the jury in regard to the *fact* which the defendants sought to establish, and which it was for the jury to pass upon. So at the outset we find the defendant going outside of the receipts which it had received, for the purpose of attempting to corroborate these receipts upon a question of fact.

The parol testimony offered by the plaintiff was offered in *rebuttal*, and the question of its admissibility is to be considered as though the receipts given to the other companies had not been offered in evidence at all.

We submit that this parol testimony was admissible:

First: Because the receipts given to the defendant are not contracts, but are to be regarded simply as receipts or admissions which may be explained or contradicted by parol.

Second: If the receipts are to be construed as contracts, the evidence was admissible to show that the contract was *without consideration*, and therefore void; and also to show the circumstances surrounding the parties at the time they were given, and to aid the court in construing the writings and to apply them to the subject matter intended by the parties.

First: These receipts are not contracts and are to be regarded merely as receipts for the money actually paid and like all other receipts are at most but *prima facie* evidence, to be considered by the jury with the other evidence in the case. The scope and effect to be given them depends entirely upon the intentions of the parties at the time they were executed and this intention was a proper question for the jury.

Of the numerous authorities applicable we cite the following:

In LEE VS. LANCASHIRE, &C., RAILWAY CO, L. R. 6, CH. APP. CAS. 527, the plaintiff had been injured by a railway accident and sent in a claim of £691. The traffic manager called upon him to discuss the amount of his claim, and it was agreed that the company should pay the plaintiff £400 and all medical bills in relation to the accident. The payment was made and the plaintiff gave the following receipt: "*Received from "the Lancashire and Yorkshire Railway Co., the sum "of £400 in discharge of my claim in full upon that com- "pany for all loss sustained and expenses incurred by the "late accident at Miles Platting, including all the expenses "attending the same.*" Subsequently, the plaintiff, on the ground that his injuries were more serious and permanent than were supposed, commenced an action against the company, claiming £300 damages in addition to what he had been paid. Defendant pleaded accord and satisfaction; thereupon plaintiff filed his bill, alleging among other things that when he made the above settlement, both he and defendant's agents supposed that he would soon be quite well, and that relying on the accuracy of the statements and advice which he received in this respect, he accepted the £400; that he read and signed the receipts on the assurance of medical men that his injuries were only temporary; that he signed the receipts on the condition that he shonld not exclude himself from further compensation if such injuries eventually turned out to be more serious than was antici-

pated. The bill prayed that the receipt ought to stand as a receipt only for £400, and that the company might be restrained from relying on their plea in the action at law and from setting up the same as a satisfaction and discharge of the damages claimed by the plaintiff, except to the extent of the £400. There was no allegation of fraud in obtaining the receipts. Held, that as the statement in the receipt could be rebutted by evidence that the plaintiff did not receive the money in full satisfaction of all demands, the whole case could be tried at law better than in equity and that the bill ought to be dismissed.

James, L. J., said:

"Is there, on the plaintiff's own showing, any necessity for coming "into equity to get rid of the receipt? The having given it does not "estop the plaintiff from saying that there was no accord and no satis- "faction, and it therefore appears to me that the whole of the case "could be sufficiently dealt with by a jury."

Mellish, L. J., said:

"I had some little doubt in the course of the argument whether it "might not be said that this document amounted to an agreement, in "which case, no doubt, the rule of the law would apply, that if the part- "ies had reduced their agreement into writing, they could not vary the "terms of that agreement by parol evidence; but in looking at the doc- "ument I am convinced it is simply a receipt. It simply states a fact— "it does not state an agreement or purport to bind either of the parties "to any terms whatever. It simply acknowledges that a sum of money "was received, and then states in respect of what it was received, viz.: "in satisfaction of the damages plaintiff sustained by the collision. "Where a release discharges the cause of action altogether, it can "only be set aside in a court of law under what is called the equitable "jurisdiction, which in certain circumstances courts of law can exercise. "A receipt not under seal has no such effect, but amounts simply to an "acknowledgment. It has the same effect as if a man had written a "letter saying he had received a sum of money in satisfaction, or as if, "in the course of conversation, he had mentioned he had received it in "satisfaction. It is merely evidence of satisfaction and liable to be "rebutted by contrary evidence."

After reviewing numerous authorities, his lordship says:

"The distinction between a receipt and a release has been long "established. The fact of a release must be pleaded and put on the "record; a receipt cannot be pleaded in answer to the action. It is "only evidence on a plea of payment, and if it is not conclusive as to "the money having been paid, neither is it conclusive as to the cause in "respect of which it is stated on the receipt that it was paid."

At page 537 the court quotes approvingly the charge of Chief Justice Earle, in 1 F. & F., 706, where he said:

"The question for you will be whether the plaintiff's mind went with "the terms of the receipt. The plea is that the plaintiff accepted the "money in satisfaction for the grievances complained of, that is, the "injuries now proved to have been sustained. In terms the receipt which "he signed no doubt supports the plea: *Did his mind go with those "terms?*"

LAWRENCE vs. NAV. CO., 4 WASH. 562. Plaintiff did certain stone work in constructing locks on a canal. After the work was completed a dispute arose between the parties as to the quantity of work done and the price, and one of the defendant's officers made a statement of the account, which was presented to plaintiff, showing balance due him $3,833. Appended to the statement of the account was this memorandum, viz.: "*This account is to "include every claim I have against the Schuylkill Navi-"gation Company.*" This memorandum was signed by plaintiff, who at the same time gave a receipt acknowledging that he had received the $3,833, being the full amount due on the settlement of his accounts against the said company. Held, that he was not estopped from showing that the amount paid him and included in the receipts was less than what was actually due him, and that he might recover the balance. The court says:

"The principles governing the case are: 1. That a receipt in full "is not conclusive, but is mere *prima facie* evidence of what it pur-"ports. 2. That if proof be made that it was unfairly obtained, or "that it was given under a mistake of facts, or of the legal rights of the "party who gives it, it is open for examination of any errors which may "be pointed out and proved. But if the claim of the person giving the "receipt is honestly contested, and a compromise be agreed upon, both "parties are bound by it. Lastly, that being *prima facie* evidence of "what it purports, the party who would impeach it on the ground of "unfairness or mistake, must maintain his allegation by proof."

PAYLER vs. HOMERSHAM, 4 M. and S., 423. An action of debt on bond; defendant pleaded a release, which recited that defendant "*being indebted to divers "creditors in sums set opposite their names, and that he was "liable to pay them in full, and that the creditors named, of*

"*whom plaintiff was one, agreed to take 15s on the £1 in full,* "*and that in consideration of the payment of 15s paid to them* "*by defendant, each of the creditors did release defendant* "*from all manner of actions, causes of actions, suits, debts,* "*claims, and demands in law and equity which they or any* "*of them had against him, or thereafter could, should or* "*might have by reason of anything from the beginning of* "*the world to the date of the release.*" Held, that the plaintiff might in his replication plead that the bond sued upon was given as security for moneys advanced for defendant, and although part of the money was due at the date of the release, that the same *was not, nor was any part of it, intended to be included in the release.*

SIMONS vs. JOHNSON, 3 B. and Ad., 175. An action of covenant; defendant pleaded a release, which recited that various disputes were existing between the parties, and that actions had been brought against each other, which were still depending, and it had been agreed between them that, in order to put an end thereto, the defendant should pay to the plaintiff £150, and each should release the other from all actions, causes of action, and claims, brought by him, or which he had against the other, and the instrument then proceeded to release "all claims, demands, actions whatsoever." Held, that parol evidence was admissible to show that the claim upon the covenant was not intended to be included in the release, all the judges delivering opinions, except one, who assented. Littledale, J., said:

"There can be no doubt that the matter contemplated in this "release was the actions there referred to, and parol evidence was "admissible to show that the subject matter of the present action was "not involved in them."

See Lampon vs. Corke, 5 B. and Ald., 606.

FOERSCHE VS. BLACKWELL, 14 BARB., 607. Plaintiff had a written contract with defendant to excavate a portion of a ship canal, for which the latter was to pay ten

cents per cubic yard. After plaintiff had performed part of the work, defendant refused to permit him to proceed further. It was proved that after the breach of contract defendant settled with plaintiffs, and paid them $42.20, and took a receipt on the back of the contract, thus:

"*Received, Buffalo, Dec. 28th, 1849, from E. R. Black-*
"*well & Co., $42.20, in full satisfaction for the work done*
"*under this contract, which is hereby canceled.*"

Held, that this did not amount to an accord and satisfaction, and that the receipt did not bar plaintiffs' right of action.

GRUMLY VS. WEBB, 44 Mo., 444. The document read as follows:

"*Received from W. G. Webb $6,500, which is in full*
"*satisfaction of a judgment recovered by me against said*
"*Webb and D. S. Bigham in the St. Louis Circuit Court:*
"*the said sum is in full satisfaction of all claims and demands*
"*I have or hold against the said Bigham and Webb, or either*
"*of them, up to this date.*"

Held, that it would not avail against a claim in another suit pending between the same parties and not shown to have been intended by them to be included in the receipt. Court say:

"The language, however general in its form, when used in con-
"nection with a particular subject matter, will be presumed to be used
"in subordination to that matter and will be construed and limited
"accordingly."

CORN EXCHANGE BANK VS. SCHEPPERS, 111 U. S., 440. Bullock's Sons received from Scheppers certain promissory notes to be used in connection with the purchase of wool, for which they gave receipts, some expressing on their face that the notes were for wool purchased, others on account of wool purchased or to be purchased. One of the receipts concluded in these words: "These "notes being issued for our benefit to be protected by us at "maturity." The last of the receipts read thus:

"*Received, Philadelphia, August 1, 1873, of Scheppers*

" *Brothers, their promissory notes, each for $5,000, maturing*
" *as follows: 1 January 2-5; 1 January 5-8 . . . .*
" *aggregating in amount $150,000, for purchase of wool, or*
" *to be protected by us at maturity.*

"*Benjamin Bullock's Sons.*"

The question involved was whether Bullock's Sons had the right to use these notes for their accommodation. Mr. Justice Miller in his opinion said:

"To say that they were to be used for purchase of wool is to repeat "what the receipt says, and is in accord with it. To deny that some "of them might be used for the benefit of Bullock's Sons is to contra- "dict the receipt, and no one does deny it in express terms.

"If, however, any witness had so sworn who was present when the "receipt was signed and the notes were delivered, it was a question for "the jury whether his statement or the writing produced was the most "credible, and this question the judge took from them by his peremp- "tory instruction, three times repeated, that there was no right in "Bullock's Sons to pledge the notes as collateral for their own debt, "and to do so was to break faith with Scheppers Brothers. For this "error the judgment of the Circuit Court was reversed."

PRICE VS. TREAT, 45 N. W., 790. Plaintiff had claims under a contract for work done in the construction of a railway: a settlement was had, and he was paid $6,532.27, for which he gave the following:

"*Received from C. P. Treat $6,532.27, in full settlement*
" *of the within contract and in full of all demands. In con-*
" *sideration of said payment already received by me, I hereby*
" *release him, and also the Fremont, Elkhorn and Missouri*
" *Valley R. R. Co. and the Chicago and Northwestern R'y*
" *Co., from all claims, actions or causes of action which have*
" *arisen or may or can arise to me against any or either of*
" *them by reason of any connection I may have had with them*
" *heretofore.*

" (*Signed*) *Thomas Price.*"
" *Dated May 21, '86.*"
" *Witness, C. W. Mosher.*"

Plaintiff claimed, notwithstanding the language of the receipt, that the sum paid was not intended to be in full of his demands. The court below held that the receipt was

conclusive, and rendered judgment thereon for the defendant. This ruling was held to be erroneous upon the ground that the "writing which the parties had signed was not a "contract, but a mere receipt, and therefore not conclusive "between the parties." The Court say:

"The principal question presented is whether the writing set out "in the answer was a contract or a receipt. If it is a contract, then its "construction devolved upon the Court, and if, upon being construed, "it was found to constitute a full defense to the cause of action set out "in the petition, the sustaining of the defendant's motion and the "dismissal of the action were right. If, on the other hand, the paper "is only a receipt for the sum of money therein expressed, it was "subject to the denial, contradiction, and qualification thereof set out "in the plaintiff's reply, and should have been submitted to the jury. "'A contract or agreement, not under seal, may be defined to be an "engagement entered into between two or more persons, whereby, in "consideration of something done, or to be done, by the party or par-"ties on one side, the party or parties on the other promise to do, or "omit to do, some act; and from this definition it appears that to con-"stitute such an agreement there must be (1) the reciprocal or mutual "assent of two or more persons; (2) a good and valid consideration; "and (3) something to be done or omitted which is the object of the "contract.' [1 Chit. Cont. 11."]

The Court then refers to the facts showing that a larger amount than the sum paid was due to the plaintiff, and says:

"From a hasty computation it appears that there was, from the "above admissions of defendant, the whole amount alleged to have "been paid to the plaintiff due to him for said work, and the defendant "alleges the same in the answer. The payment of part of this money "is the consideration named in the writing. This writing must be read "in connection with the balance of the answer. When so read it "clearly appears to be lacking in the necessary element of a considera-"tion to constitute it a contract. Counsel for defendant in error, in the "brief, claim that the writing under consideration is more than a "receipt, and they cite cases which establish the proposition that when "a receipt 'contains an agreement or stipulation upon a compromise or "settlement of disputed claims, or unliquidated damages, that the one "party is to receive or accept a certain sum in full acquittance and dis-"charge of such claim, it is a contract, and is not liable to be contra-"dicted by parol, but is conclusive upon the parties in the absence of "fraud or mistake.' But it is to be observed that in the case at bar the "claim for the payment for which the receipt was given was not a "disputed claim, nor was it for unliquidated damages, but was for an

"amount of money shown to be due to the plaintiff in error by the esti-
"mate of the engineer of the work, and never disputed by the defend-
"ant in error. The fact that the plaintiff claimed that not only this,
"but a larger sum in addition was due to him, did not make this a
"disputed claim. * * * 'When any ascertained sum
"of money is due and payable from one to another, if the creditor
"accepts a less sum in satisfaction or promises to take less, the pay-
"ment in the one instance is a discharge of only so much as it
"amounts to, and in the other the promise is void.'—[Bish. Cont., 50-6.]
"To my mind the logical conclusion is the same in a case where the
"amount paid and receipted for is the precise sum admitted by the
"payor to be due, and the giver of the receipt then or afterwards
"claims an additional sum to be due him."

ABBE VS. EATON, 51 N. Y., 410. Goods had been shipped under a bill of lading containing this clause: "*All damages caused by boat or carrier, or deficiency of cargo "from quantity, as herein specified, to be paid by the "carrier, and deducted from the freight, and any excess "on the cargo to be paid for to the carrier by the consignees.*" This was held not to be conclusive as to the quantity specified, nor an agreement that the bill of lading should furnish the only evidence of the quantity, but was *prima facie* evidence only.

ROUTLEDGE VS. WORTHINGTON CO., 23 N. E., 1111; 119 N. Y., 592. The action was brought to recover for certain sets of Dickens' Works sold by plaintiffs to defendants upon the following written order:

"*March* 8, 1886. *Messrs. George Routledge & Sons:*
"*Gents—I agree to take 1,000 sets of Dickens' sheets same as*
"*last, as under: 250 sets delivered as soon as printed; 250 sets*
"*to be delivered in July; 250 to be delivered in September; 250*
"*sets to be delivered in November. Terms, 30 days from deliv-*
"*ery. Five per cent. for cash. We have ordered Baldwin to*
"*deliver boxes to Baldwin for the Bulwer. Terms cash, 30*
"*days. $4.00 per set.*

"*Imprint of Dickens' change from '28 Lafayette Place*
"*to 747 Broadway.' All else will do.*

"(*Signed*) *Worthington Company.*"

Defendant offered to prove by parol that at the time this writing was made it was made a part of the agree-

ment that the trade price at which plaintiffs sold the works should not be lowered, and that the price then was $6.50. And it was held that the evidence was competent. The Court say:

"Defendant is concluded, *prima facie*, as to its promises in writ-
"ing, but whether the plaintiffs promised something more than can be
"inferred from that writing, and which may constitute a separate
"undertaking, leading to the defendant's order, and what they did at
"the interview when the bargain was arranged, must be shown by a
"resort to the conversation. * * * The rule which rejects
"parol evidence when offered with respect to a contract between par-
"ties and put into writing has no application to a case like this, where,
"of the original agreement which has been executed, a part only is in
"writing and the rest was verbal. The principle of liability is the
"same, whether the whole transaction be embodied in one written
"instrument, setting forth the respective obligations of both parties, or
"whether it takes the form of a separate undertaking by each party.
"Whether we regard the writing of the defendant as an order, or as
"an agreement, is quite immaterial. In either view it was an admis-
"sion only of the defendant's engagement."

WISE VS. ROSENBLATT, 12 N. Y., SUPPL., 288. Defendants signed the following: "*March 20, 1889. Received "of L. & C. Wise .... dollars, advance invoice of March 20th, "1889, on account of all goods consigned to them; the same to "be sold at their discretion, without limit as to time and "price.*"

Held, that oral evidence was admissible for defendant of a guaranty to the plaintiffs from the defendant, made at the time of, and as a part of, the agreement that goods would sell and realize not less than a certain price.

See also

Curtis vs. Soltau, 12 N. Y. Supl. 285.
Tocci vs. Arata, Ibid 287.

ST. LOUIS, &C., R. R. CO. VS. DAVIS, 35 KANSAS, 464. The case strongly resembles the one at bar. Plaintiff had rendered legal services to the defendant in what was known as the *Abandoned Right of Way Cases*, under a contract by which he was to be paid $1,200; he also rendered other services in what was known as the *Whittaker Cases*. There remained $600 owing to him in the *Aban-*

doned Right of Way Cases, which he demanded, and defendant's superintendent told him that the company had no money, but offered plaintiff his individual check for $400 if plaintiff would give a clear receipt for $600. This was done. Subsequently plaintiff demanded of the company the $200 covered by his receipt, but not paid, and also what he claimed to be due for services in the *Whittaker Cases*. Defendant's auditor refused to recognize any liability for the services rendered in the Whittaker Cases, but offered plaintiff a check for the $200 remaining unpaid on account of services in the *Abandoned Right of Way Cases* if plaintiff would give a receipt in full for all services, including those rendered in the *Whittaker Cases*, which plaintiff agreed to do, and a check and receipt to that effect was passed. In his action to recover for services in the *Whittaker Cases*, defendant pleaded accord and satisfaction. Held, that the payment of a portion of an ascertained and undisputed debt, although accepted in full satisfaction and a receipt in full given, is not a satisfaction of the balance, and will not, where there is no new consideration, estop a creditor from recovering the remainder of the debt, and that before the acceptance by the creditor of an amount less than his claim in accord and satisfaction of the entire debt, it must have been accepted on an express agreement to that effect. That the receipt, although it recites that it was in full for all services rendered to the company, including those for which the action was brought, is *prima facie* evidence only of an admission which it contains, where it does not embody a contract; it is open to explanation, and the party admitting payment in full may show it to be untrue. The court say:

"There was no agreement that the sum paid should operate as a "total extinguishment of the entire indebtedness. This was the claim "of the railroad company, and there was considerable evidence offered "in support of it; but the finding of the court is substantially that "notwithstanding the signing of the receipt for the entire sum, there "was an understanding and agreement that the balance was still "due and would be paid. There was then $200 of a balance due to the "plaintiff on the 'Right of Way Cases,' and it will be observed that

"this is the amount mentioned in the final receipt, which payment and "receipt the railroad company insists is a valid discharge of the plain- "tiff's claim for services in the 'Whittaker Cases.' Treating this as a "payment of what was due under the former contract for the 'Right "of Way cases,' as the court below seems to have done, nothing what- "ever has been paid to the plaintiff upon the claim on which he sues. "* * * * As we have seen, the payment of a less sum does not "have the effect of satisfying a greater one, unless it has been expressly "accepted as such by the creditor. It is true the plaintiff signed the "receipt acknowledging payment in full, but there was no contract "embodied in the receipt. It is well settled in this state that a receipt "furnishes only *prima facie* evidence of the declarations and admissions "which it contains, and that a party giving a receipt admitting pay- "ment in full has a right to show that it is untrue."

II.

EVEN IF THE RECEIPTS AND THE CERTIFICATE OF ADJUSTMENT CAN BE REGARDED AS CONTRACTS, OR AS CONSTITUTING AN AGREEMENT OF COMPROMISE BETWEEN THE PARTIES, STILL THE PAROL TESTIMONY OFFERED BY THE PLAINTIFF WAS ADMISSIBLE:

First—TO SHOW THE FACTS AND CIRCUMSTANCES SURROUNDING THE PARTIES AT THE TIME THE PAPERS WERE EXECUTED AND THE CLAIM OR SUBJECT MATTER TO WHICH THEY WERE INTENDED TO APPLY.

Second—TO SHOW THAT THE ALLEGED AGREEMENT WAS WITHOUT CONSIDERATION, AND THEREFORE VOID.

First—Parol evidence of the circumstances of the parties at the time a contract is made is always admissible to show the subject matter which the parties had in mind, and to which the contract was intended to apply, in order to aid the Court in properly construing the contract.

The evidence in this case does not necessarily "contradict" the certificate of adjustment, Exhibit Q Q, nor the receipts, but may be considered as in harmony with them. It shows *the* claim or subject matter to which the certificate and the receipts were intended to apply. Taken in connection with the written submission to the appraisers,

Exhibit A, Rec. 26, and the written proofs of loss prepared by the insurer's own agent, and his letter which accompanied these proofs, and the written record of the meeting held by the insurers to consider the plaintiff's loss, Exhibit P P, Rec. 12, the parol testimony offered by the plaintiff shows, as already stated, that the insurers regarded that loss as consisting of *two distinct* and *separate* claims or items, one of which they were ready to pay without discount and without delay, but they utterly repudiated their liability for the other, and refused even to consider it.

The evidence further shows that Exhibit PP was shown to Wickham by Oakley and Wellman as *the evidence of their special authority to negotiate with him*, limiting their power, and confining it to a settlement of the claim for repairs set forth in the proofs of loss. As stated in the brief of counsel for the plaintiff in error presented to this Court upon the motion heretofore made to dismiss this case for want of jurisdiction, and from which we quote: "There "were two distinct classes of loss growing out of these "fires: (a) The loss caused by the fire to the hull of said "vessel, including tackle, furniture and appurtenances "(Rec., p. 5, sec. 6), and (b) The cost of raising and saving "said vessel and the cargo which has thus been sunk, "amounting to over $15,000," citing Rec., 4-6, Ex. PP, sec. 5-7-9.

Now, the submission to the appraisers excluded in express terms the claim "for saving boat and cargo," or the salvage claim, and covered only the loss to the hull of said vessel, including the tackle, etc., amounting to $15,364.78, and the proofs of loss prepared and forwarded as above stated were also confined to that claim, and the written resolution, embodied in Exhibit PP, shows that the companies resolved to pay the claim set forth in the proofs of loss; and the certificate of adjustment, Exhibit Q Q, is the adjustment or apportionment of the *exact amount of that loss* among the various companies; and the receipts given were for that exact amount; and we submit that from these

various documents, the submission to appraisers, the proofs of loss, the certificate of adjustment and the receipts, if read and construed together, as they should be, the inference arises irresistibly that they were all intended to relate to the *same* claim, to the same "distinct class of loss," to wit, the cost of the repairs; and that only *that* claim was in the mind of the parties when the payments were made and the receipts given, and that "the plaintiff's mind went with the receipt" only to the extent of the claim for repairs and no farther.

But whether this is the proper construction to be given to the writings themselves, if there is any doubt or ambiguity arising because the receipts purport to be "in full of all claims and demands," the parol testimony was admissible to connect these several written documents together and to explain the ambiguity, and especially to show the statements made by the committee, Oakley and Wellman, when they handed Exhibit PP to the plaintiff, that their authority was limited by the terms of the resolution adopted by the meeting and set forth in said exhibit, and that they *could not* go beyond it and consider this claim for raising and saving the vessel, even if they were disposed to do so.

Bradley vs. Company, 13 Peters, 89.
Reed vs. Insurance Co., 95 U. S., 23.
U. S. vs. Peck, 102 U. S., 64.
Thorington vs. Smith, 8 Wall, 1.
2 Wharton on Evidence, § 940 and cases there cited.
Persch vs. Dickson, 1 Mason, 11.

Second—The parol testimony was admissible to show that there was no consideration for the alleged agreement of compromise, to sustain which defendants offered the receipts in evidence.

It is a familiar rule that the want or failure of consideration, may always be proved by parol testimony, showing that the written agreement is not binding.

2 Taylor on Evidence, sec. 1138.
Schmittler vs. Simon, 114 N. Y., 184.
Abbott vs. Hendricks, 1 M. & G., 791.
Jennison vs. Stone, 33 Mich., 99.
2 Wharton on Ev., §§ 1042-1044-1047.

It being admitted that the insurers were liable for the salvage expenses as well as the cost of repairing the vessel, and that they have only paid the cost of the repairs, payment of that sum can in itself be no consideration for an agreement to surrender and discharge the rest of the claim. The payment of a part of a debt, of itself, is never a consideration for the release of the entire debt. A man can never, by the mere payment of one dollar, discharge a debt for two dollars, although the parties should so agree in the most solemn manner.

Harriman vs. Harriman, 12 Gray, 343.
Redfield vs. Holland Ins. Co., 56 N. Y., 354.
Ryan vs. Ward, 48 N. Y., 594.
White vs. Jordan, 27 Me., 370
Bailey vs. Day, 26 Me., 88.
Weber vs. Couch, 134 Mass., 26.
Gold M. S. Co. vs. Harris, 124 Mass., 206.
Beer vs. Foakes, L. R. 11 Q. B. D., 221.
Brown vs. Memphis, 1 Flippin, 207, App. 21 Wall, 209.
Foersche vs. Blackwell, 14 Barb., 607.
Grinnell vs. Spink, 128 Mass., 25.

We submit that if the payment of a part of the admitted claim forms no consideration for an agreement to release the balance of the claim, neither can the payment of one admitted claim be a consideration for an agreement to release another distinct and separate claim, liability for which is denied by the debtor.

In this case, it being now admitted that the insurers are liable for the salvage expenses as well as the cost of the repairs, and that the plaintiff in error has paid only its exact proportion of the cost of the repairs, that payment *itself* could constitute no consideration for an agreement to release what was justly and legally due from the plaintiff in error for the salvage expenses.

The following cases seem to be directly in point:

In REDFIELD vs. HOLLAND INS. CO., 56 N. Y., 354, the policy was for $1,500, five hundred dollars on a dwelling house and six hundred dollars on a barn, and four hundred dollars on the produce therein. The barn and its contents were destroyed by fire. The company did not dispute its liability for the four hundred dollars on the produce, and paid this amount, and received from the insured a writing in which he declared that he accepted the four hundred dollars in full satisfaction for the loss sustained, cancelling the $1,500 on said policy. Held, that this would not preclude the insured from recovering the loss on the barn. The Court say:

"The referee finds that the liability of the defendant was not "disputed, and the sum paid was for the insurance on the produce. "There was no technical release, and the payment of this sum for a "distinct loss is no consideration for the discharge of the liability of "the defendant in respect to the insurance on the barn; the want of "consideration for the discharge of that liability was a good answer to "the claim that it was covered by the terms of the receipt."

In AMERICAN BRIDGE CO. VS. MURPHY, 13 KANSAS, 35, Murphy brought suit to recover a balance alleged to be due him on a written contract for boarding persons employed by the bridge company. The answer set up an accounting and the payment of the balance found due on such accounting. At the trial defendant produced the following receipt:

"Received of G. Gates, Agent for the American Bridge "Company, $134 (exclusive of $53.00 left in Justice Gould's "Court as garnish in case of Gardner & Bro. vs. T. J. Mur-"phy, subject to the order of said court), the same being in "full of all money due on board of hands of said Murphy."

Held, that he was not estopped to recover the balance actually due to him. The Court say:

"Where a debtor pays a portion of his debt, which portion he "admits to be due at the time he pays it, but claims that it is all that "is due, and that it is the whole of the debt, and the creditor receives "the same and so receipts in full therefor, but at the same time claims "that it is only a portion of the debt, and that the other portion still

"remains due, the creditor is not estopped by his receipt from after-"wards suing the debtor, and recovering the balance not yet paid," citing 48 N. Y., 204; 15 Ind., 371; 11 Vt., 60; 20 Ill., 558.

See also:

Tyler vs. Oddfellows Association, 145 Mass., 134.
1 Wood on Insurance, 316.
St. Louis, &c., R. R. Co. vs. Davis, 35 Kansas, 464.
Price vs. Treat, 45 N. W., 700 ante.

Now apply these cases: It is admitted by the insurers that there were "two distinct classes of loss growing out of these fires." (a) The loss of the repairs set forth in the proofs of loss, and (b) The cost of raising and saving the vessel and cargo," and that each of these amounted to more than $15,000.

How can the payment of the exact amount of the cost of repairs be a consideration for an agreement to release a claim for the cost of raising and saving the vessel and cargo?

Suppose a policy to cover a house and a barn, and loss happens to both. The insurers receive proofs of loss made out by their own agents, covering the cost of repairing the house, but no proofs of loss as to the barn. They admit their liability as to the house, and assert their readiness to pay according to the proofs of loss which they have received, but deny all liability for the damage done to the barn, and refuse to consider any claim therefor. How can the payment in such a case of the exact loss to the house be a consideration for a release by the insured of his claim for damages done to the barn? Is not the case at bar parallel to the case supposed?

But it is now virtually conceded by the insurers that the payment of the sums mentioned in the receipts, being the exact proportion due from the plaintiff in error for the cost of the repairs, in itself is no consideration to support the alleged agreement of compromise, and the only consideration now insisted upon is the assumed fact that the payment was made about fifty-five days before it was actually due:

that is, fifty-five days before the lapse of sixty days from the time proofs of loss were furnished; and the only question is whether such pre-payment, *under the facts and circumstances of this case*, is a sufficient consideration to sustain the alleged compromise. We insist that it is not for two reasons:

1. Because such prepayment is not set up in the defendant's plea as the consideration. The plea alleges that the defendants paid to the plaintiff "*a valuable consideration, to wit: the sum of* $1,920.60, *in full accord and satisfaction, etc., for loss and damage by fire at the several times in said plaintiff's declaration set forth, etc.* * * * *which valuable consideration or sum of money, so paid as aforesaid, was then and there accepted and received by said plaintiff in full payment and satisfaction, release and discharge of the said two policies of insurance, etc.* * * * *And in consideration of said sum of money so paid and received as aforesaid, said plaintiff then and there released in writing the said defendant, etc.*" (*Rec., 33-34.*)

Nowhere in the plea is it averred that the *pre-payment* of this sum, which is the exact amount mentioned in the receipts, was the consideration for the alleged compromise or release. Nor is the fact of pre-payment alleged in the plea.

The defense of accord and satisfaction must be specially pleaded, and the plea must set forth the consideration.

2. Because the receipts do not mention the pre-payment as a consideration for the release or for the surrender of the policy. If the parties intended and understood that the pre-payment of the admitted claim was a consideration for waiving the other claim of equal validity and for an equal amount, why is it not mentioned in the receipts? The only consideration therein mentioned is the payment of the exact sum due upon the claim as set forth in the proofs of loss. So that the insurers themselves are compelled to go outside of the writing, outside of the receipts, for the purpose

of proving by parol the fact that the pre-payment was a consideration for the release. It was certainly competent to meet such proof by the testimony offered by the insured by parol testimony on the part of the plaintiff.

It should be remembered that under the policy issued by one of the companies, The Liverpool & London & Globe, the loss was fully due at the time the payment was made. There was no provision in that policy that the loss should not be payable until sixty days after the service of the proofs of loss. (See Record, p. 4.) Therefore, as to that company at least, there was no semblance of a consideration to support the alleged compromise.

But we submit that as to none of the companies would the pre-payment of the loss before the time it became due be a consideration to support the alleged agreement of compromise, *unless it was so understood by the parties at the time the payment was made.*

This was a question for the jury, and was fully and fairly submitted to them by charge of the district judge, who said to the jury that the verdict should be for the defendant if they "found the entire claim of the plaintiff was compromised upon a sufficient consideration." (Rec., 22.) He further instructed the jury (Rec., 23-24) that "the pay-"ment of the policy fifty-five days in advance of the time "when the same would become due without discount for "interest was by itself a sufficient consideration for waiving "the plaintiff's further claim under the policies, if it was "understood as such. This pre-payment of fifty-five days, "to be a sufficient consideration for the release of the "plaintiff's claim for the wrecking expenses, must have "been understood between the parties to be such, and this "pre-payment is a sufficient consideration to support the "settlement by which the $15,000 was paid in full, if it was "understood as such."

We submit that this is a fair and correct statement of the law applicable to the case. The minds of the parties must have met upon this point as well as upon all the other terms of the contract.

In PHILPOT vs. GRUNNIGER, 14 WALL., 577, it is said:

"Nothing is consideration that is not regarded as such by both "parties."

In ELLIS vs. CLARK, 110 MASS., 386, Mr. Justice GRAY said:

"Any loss or disadvantage to the plaintiff by giving up some right "against a third person, or agreeing to abandon and delay the enforc- "ing of some right against him, would be sufficient. "But the consid- "eration or motive of the promise must be known to the promisor. "The minds of the parties must meet and agree upon the terms of the "whole contract, including the promise on the one side and the con- "sideration for it on the other."

In KIRKPATRICK vs. MUIRHEAD, 16 PA. ST., 117, it is said:

"Consideration, like every other part of the contract, must be the "result of agreement. The parties must understand and be influenced "to the particular action by something of value or convenience and "inconvenience recognized by both of them as the moving cause. That "which is a mere fortuitous result flowing accidentally from an "arrangement, but in no degree prompting the actors to it, is not to be "esteemed to be a legal consideration."

Wald's Pollock on Contracts, 9.
1 Addison on Contracts, 15.

Now, as the only consideration relied upon is the pre-payment of the claim set forth in the proofs of loss, and as such pre-payment does not appear upon the face of the receipts, it was competent to show by parol that the right to delay the payment was waived by the companies, and that they volunteered to pay that portion of the loss without discount, that the plaintiffs were never requested to compromise or release their claim for the expenses of raising and saving the vessel as a consideration for such pre-payment, and that at the time the negotiation took place this salvage claim was not spoken of except by Wickham, when he offered to compromise it, which offer was declined by the committee upon the ground that they had no authority to consider the matter. (Rec. 13.)

The condition or stipulation of the policy, which gave insurer the right to delay payment until the expiration of a certain time after the proofs of loss were furnished, was a condition which the insurer could waive at its option. And, in the language of this court, speaking through Mr. Justice Bradley, in *Insurance Co. vs. Norton*, 96 U. S., 240:

"Whether it did exercise such option or not was a fact "provable by parol evidence, as well as by writing, for the "obvious reason that it could be done without writing."

If the insurers *did* exercise this option, and agree to waive the right to delay making the payment until the sixty days had expired, the "pre-payment" cannot be regarded as a consideration to support the alleged compromise.

Greenfield vs. Company, 47 N. Y., 430.
Sheldon vs. Company, 25 Conn., 207.

The parol testimony was competent to show the circumstances under which the policies were surrendered, and that there was no consideration, and that the payment recited in the receipt was not the consideration for such surrender.

The receipts declared that, "in consideration of said payment," *i. e.*, the exact sum mentioned in the proofs of loss, said policy "is hereby cancelled and surrendered." But it appears that the insured, at the time he gave these receipts, and as a part of the same transaction, executed two other receipts to the plaintiff in error which were produced and offered in evidence by it, which show that the policies were surrendered in consideration of the return premium. These several receipts which were given to the plaintiff in error having been executed at the same time, in regard to the same subject matter, are to be read and construed together, and if so read, they show an apparent contradiction: one declaring that the policies were surrendered in consideration of the payment of the adjustment loss, and the other that they were surrendered in consideration of the return

premium. This constitutes an ambiguity which if was competent for the plaintiff to explain by parol testimony.

It appears that the policies contain the following clause: "This insurance may be terminated at any time, at the "option of the company, on giving notice to that effect to "the insured, either verbally or by leaving such notice at "his last known place of residence or business. In such "case the insured shall be entitled to claim a ratable pro- "portion of the premium for the unexpired term, for which "the policy was to run."

We submit that the parol testimony was competent to prove that the surrender was made after the certificate of adjustment, "Exhibit QQ," had been signed in compliance with the demand made upon the insured for such surrender under the said clause of the policy and in consideration of the payment to the insured of the unearned premiums.

This testimony did not tend to contradict the receipts, but is really in accordance with the receipts. The testimony was competent to explain the ambiguity upon the face of the receipts. The policies had several months yet to run when the settlement was made.

The record shows that the testimony upon this point was conflicting (Rec. 15), and it was properly submitted to the jury by the District Judge who charged them as follows: (See Rec. 25.) "The surrender of these policies is "evidence, and pretty strong evidence, it seems to me, of "the intention of the plaintiff to relinquish his entire claim, "and yet it is not sufficient of itself to defeat his right of "recovery. If you find the policies were surrendered in "consideration of the unearned premiums stated in the "receipts upon the policy, then the defence of the surrender "is no defence in the suit, and while the surrender has a "tendency to show his relinquishment of all rights under "the policy, still it is not conclusive, if you find, as you "are at liberty to do, that the surrender was made in con- "sideration of the unearned premiums."

Under this charge the verdict must be considered as establishing the fact that the policies were surrendered, not as a part of the agreement of compromise, and not in consideration of the payment of the sum mentioned in the first receipt, but as stated in the second receipt and as testified by Wickham, in consideration of the payment to the insured of the unearned premiums and under the clause of the policy referred to.

The surrender of the policies could not *ipso facto* prevent the insured from maintaining an action for the loss which had occurred prior to the surrender; nor is such surrender of itself conclusive evidence of the agreement to relinquish such claim.

Redfield vs. Holland Ins. Co., 56 N. Y., 354.
1 Wood on Insurance, 288.
Hollingsworth vs. Germania Ins. Co., 45 Ga., 294; 12 Am. 579.
Nightingale vs. Chaffee, 11 R. I. 609, 23 Am., 531.

In STONE VS. FRANKLIN INS. CO., 105 N. Y., 543–550, it is said that if the policy had not been cancelled before the fire and thus had remained in force, its subsequent surrender to the defendant would not have extinguished the cause of action for its loss.

Van Valkenburg vs. Lennox Fire Ins. Co., 51 N. Y., 465.
Elbert vs. Snow, 2 Sawyer, 94.
Stewart vs. Blum, 28 Pa., 225.
Foersche vs. Blackwell, 14 Barb., 608.
Daniel on Negotiable Instruments, §§ 205 and 1266.

Finally, we submit that the receipts and the certificate of adjustment, "Exhibit QQ," do not in the light of the facts and circumstances surrounding the parties at the time constitute a contract or agreement of compromise, and that no such agreement was made between the parties; but if such agreement was made, then it was without any sufficient consideration to support it, and that the parol testimony was admissible to show such want of consideration.

The surrender of the policies constitutes no defense to this action, because the surrender was no part of the alleged agreement, and was only made under the clause of the policies giving the insurers the right to cancel them upon the repayment of the unearned premium, and, clearly, the parol evidence was competent to show the facts relating to such surrender.

We submit that the question certified should be answered in the affirmative and the judgment affirmed.

Respectfully submitted.

F. H. CANFIELD,
Counsel for Def'ts in Error.